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WHERE AN OFFENSE DENOUNCED BY THE STATUTE IS OF SUCH CONTINUOUS NATURE AS TO SUBJECT THE VIOLATOR TO ONLY ONE CONVICTION FOR MORE THAN ONE ACT IN VIOLATION THEREOF.

It has always been an important question in construing a statute denouncing a certain course of conduct as criminal, to determine whether each act committed before the institution of the prosecution subject the offendant to a separate penalty, or whether, on the other hand, the offense is of such a continuous nature as to subject the defendant to only one conviction on one penalty.

The leading English case of Crepps v. Durden, has often been cited and is often relied upon. In that case the plaintiff had been convicted in four separate cases for unlawfully exercising his business of a baker by selling rolls on Sunday, contrary to the statute of 29 Car. II, ch. 7, the words of that statute being "that no tradesman or other person shall do or exercise any wordly labour, business, or work of their ordinary calling on the Lord's Day," and Lord Mansfield is quoted as saying: "The offense is exercising his ordinary trade upon the Lord's Day; and that without any fractions of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration; so whether it consists of one or a number of particular acts, the penalty incurred by this offense is five shillings. There is no idea conveyed by the act itself that if a tailor sews on the Lord's Day every stitch he takes is a separate offense, or if a shoemaker or carpenter work for different customers at different times on the same Sunday that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day."

The recent case of Wilson [v. Commonwealth, 82 S. W. Rep. 427, is an interesting application of the rule laid down by Lord Mansfield. In that case the Court of Appeals of Kentucky held in construing a statute regulating the practice of dentistry, provides that any person who shall, in violation of the act, practice dentistry in the state for fee or reward, shall be subject to indictment, and on conviction shall be fined for each offense, that the offense denounced by the statute was of such a continuous nature as to subject the violator to but one conviction for the whole period of time next before the institution of the prosecution, and hence a conviction under one indictment was a bar to proceedings under other similar indictments for previous acts, though each in itself constituted the practice of dentistry. In that case the court in its opinion gave expression to its views on this question as follows: "The question presented is whether or not the offense denounced by the statute is of such continuous nature as to subject the violator to only one conviction for the whole period of time next before the institution of the prosecution, or is it of such a character as that each act of practice constitutes a separate offense? It is apparent, upon very slight consideration, that if each time an unregistered dentist pulls a tooth he is subject to a fine of from $50 to $200, in a short while these would aggregate so large a sum as to make payment impossible, and, as a result, the defendant might lie in jail a large part of his life. Such a conclusion is not to be reached, unless constrained by the very letter of the statute. We are not without high authority, as well as sound reason, against the cumulative construction. In the case of the Apothecaries Co. v. Jones, 1 Q. B. 89, there was involved an act similar in principle to the one under consideration. The apothecaries act of 1815 (55 Geo. III, ch. 194, § 20) provided that "any person who shall 'act or practice [as an apothecary' without a certificate is liable to a penalty 'for every such offense.'" The defendant had practiced as an apothecary without a certificate, and given medical advice and supplied medicine to three different persons at different times on the same day, and it was held that the words "act or practice as an apothecary" were directed against an habitual or continuous course of conduct, and that the defendant was not guilty of a separate offense in attending each of the three persons, and was only liable to one penalty.

The court in the principal case relies strongly on the case of *In re* Snow, 120 U. S. 274, 7 Sup. Ct. Rep. 556. In that case there was involved the construction of an

act of congress directed against Mormonism. So much as illustrates the matter in hand is as follows: "Sec. 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." Act March 22, 1882, ch. 47, 22 Stat. 31. Snow was indicted by the grand jury of the United States for the November term, 1885, in the district court of the first judicial district in and for the territory of Utah, for four violations of this statute, and was convicted under each. In the opinion reversing these judgments the supreme court said: "There was but a single offense committed prior to the time the indictments were found. This appears on the face of the judgment. It refers to the indictments as found 'for the crime of unlawful cohabitation committed' 'during the time' stated, divided into three periods, according to each indictment. For so much of the offense as covered each of these periods the defendant is, according to the judgment, to be imprisoned for six months, and to pay a fine of $300. The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years, and fines amounting to $44,400, and so on, *ad infinitum*, for smaller periods of time. It is to prevent such an application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution, prior to the time the prosecution is instituted."

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE — LIABILITY OF OWNER FOR DAMAGES FOR THE FALLING OF A BUILDING DUE TO DEFECTIVE CONSTRUCTION.—A very interesting point of law is discussed in the recent case of White v. Green, 82 S. W. Rep. 329, where the Supreme Court of Texas wrestles with the question as to the liability of the owner of a building defectively constructed for damages resulting from its collapse, the court holding that the owner of a building is not liable for injury to the property of another through its fall, caused by defects in the plans and specifications of the architect; the architect and builder having been independent contractors, the owner having used ordinary care in their selection, and their negligence not having been such as he, by ordinary care, could have anticipated or known of.

The court in the course of an interesting opinion said: "Is plaintiff in error absolutely responsible for the injury caused by the falling of his building, or does his liability depend upon whether or not he used ordinary care in the construction of same? The evidence shows that the building was constructed according to the plans and specifications of an architect, which were defective, and which defects were the cause of the building falling. The trial court erred in excluding testimony offered by plaintiff in error to the effect that he had used diligence in employing a skilled and competent architect to prepare plans and specifications before he proceeded with the erection of the building. The tendency of modern decisions is not to make the owner an insurer against accidents from defects in construction, where he has used reasonable diligence to secure a said building. But he is answerable for the failure to exercise reasonable care and skill in its construction and keeping it in repair. Thompson on Neg., vol. 1, §§ 1056, 1058. We think the evidence was pertinent in determining whether or not the plaintiff in error used that care that was necessary in the erection of the building. Comparatively few men are skilled in the science of building houses, and of necessity they have to depend upon those who have made it a study. So, when an owner has used due care to employ an architect to prepare plans and specifications, and builds accordingly, he should not be held liable for the plans unless the defects were such that he should know of them.

It seems the court took the view that plaintiff in error was responsible for the want of skill in the architect and contractor, and so charged the jury. A special charge was refused to the effect that he would not be liable if he exercised such care in the employment of a skilled and competent architect as an ordinarily prudent person would have used under similar circumstances. The building seems to have been erected according to the plans and specifications of the architect, which it appears were defective, and the building fell soon after completion. This being so, the special charge was applicable to the facts, and conforms to the doctrine announced by the weight of modern decisions, and should have been given. Walden v. Finch, 70 Pa. 460; Ryder v. Kinsey (Minn.), 64 N. W. Rep. 94, 34 L. R. A. 557, 54 Am. St. Rep. 623; O'Connor v. Andrews, 81 Tex. 28, 16 S. W. Rep. 628. We take it the

work of the architect in preparing plans and specifications was that of an independent contractor. 'The general rule is that one who is having a piece of work done by an independent contractor is not liable for the negligence of the latter;' but to this there is a well-defined exception—that is, 'where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed,' the rule does not apply. Cameron Mill and Elevator Co. v. Anderson, 81 S. W. Rep. 282, 10 Tex. Ct. Rep. 459. The erection of an ordinary building is not intrinsically dangerous, and when the owner contracts with an architect and builder for its erection he is only bound to use ordinary care in their selection. So, if in this case such care was used by White in employing an independent architect and contractor, he was not responsible for their negligence, unless it was such as he, by ordinary care, could have anticipated or known thereof."

JUST CAUSE AND EXCUSE IN LABOR DISPUTES.

1. *Introductory.*—England is a trading country, and it is not surprising to find that until 1825 combinations among workmen were illegal. But almost coincident with the gift of a vote came the right of association in labor. Advantage was taken of this, and what became known as Trade Unions were formally legalized in 1871.

The influence of these bodies in England was very marked, both in limiting the industrial output, and in securing complete control of the classification and pay of artisans. Their wealth did not attract attention until, through an alliance of several of them, a struggle occurred which lasted for almost a year and cost an enormous amount of money. Prominence has its drawbacks. Consequently an experiment was tried by capital in the Taff Vale Case (1901), A. C. 426, and its conclusion startled the workmen of England. The outcome has been that in every case against a trade union the fight has been to a finish. And as a natural consequence we find old precedents, which had been supplied by minor and less far-reaching disputes reviewed and reconsidered.

The interest awakened by the case of Allen v. Flood (1898), A. C. 1, and continued in the case of Quinn v. Leatham (1901), A. C. 495, has caused the true principle as to the rights of the contending parties in labor cases to be ascertained and applied. Prior to those cases a theory had been adopted as sufficient in all cases, which is not accepted at the present day. That was, that an intentional or malicious injury, if it caused damage, was actionable, whether done by one alone or by more than one in concert. This is the conclusion to be drawn from Temperton v. Russell, decided in 1893, 1 Q. B. 435. In the light afforded by later decisions this view is now regarded as erroneous. The case of Allen v. Flood has demonstrated that malice or intent to injure (which is a state of mind) has no relation to and does not affect the existence or enforcement of a legal right. The Mogul Case (1892), A. C. 25, decided that, granting injury resulted from the action taken, yet liability is avoided if that action be in the assertion of a legal right, though done at the expense of another and intentionally so done.

Quinn v. Leatham has systematized the matter, and has pointed out why neither malicious intent nor resultant damage give a cause of action. It is because the possession of an equal right is "just cause or excuse" for acts done in asserting it, and so constitutes a defense. Just cause or excuse, therefore, if it is to be equivalent to reliance upon a legal right, must not depend upon intention or belief, it must be based upon some actuality. It may, of course, involve various elements, but it is only influenced by attitude of mind in fixing the relation of one or other of the parties to the particular dispute, and in ascertaining his true position in the quarrel.

It may be asserted generally and as a rule that the same considerations which will justify individual interference will be found applicable to associations of men, and that the connection between the men and their governing bodies and the officers thereof may be just as delicate and intricate as the relations between individuals, so far as this branch of law is concerned.

2. *Origin of Just Cause or Excuse.*—In approaching the question as to what is "just cause or excuse" there is one statement which approximates to the fundamental. Such is the oft quoted *dictum* of Sir Wm. Erle, in his work on Trade Unions (1869 Ed. p. 12). It is as follows:

"Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital, according to his own will. It follows that every other person is subject to the co-relative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."

It will be observed that the learned writer limits the original right to the doing of such acts as either (1) do not conflict with the acts of others in possession of similar rights, or (2), if they do conflict, then to such acts as are an exercise of the actor's own individual right.

Hence, collision thus anticipated is made lawful by just cause and excuse. This theory is important to a clear understanding of the subject. There are expressions in the cases which suggest

another rule of decision. But when examined they are readily harmonized with it. For example, Lord Herschell, in Allen v. Flood (1898), A. C. p. 138, discusses the underlying right of every man and asserts that everyone has a right to do any lawful act he pleases without molestation or obstruction, which wider right also embraces the right of free speech. He dissents from the view that this right is limited to damage to property or trade, and says that the Mogul case (*ante*) rests upon this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom and when, and under what circumstances and upon what conditions the parties pleased. And he adds (p. 139) that in his opinion, no one is called upon to justify either act or word merely because it interferes with another's trade, or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful, and thus to require justification. And in Boots v. Grundy, 82 L. T. 769, Bigham, J., observes that no lawful act requires to be defended by any just cause or excuse—it carries its just cause or excuse with it.

A first sight these views appear to be inconsistent with Sir William Erle's theory. But they are not really so. An act may be lawful or unlawful, according to circumstances. For instance a trespasser may be ejected. The force necessary to do so may or may not constitute an assault, and this will depend on whether sufficient notice was given before it was applied. If done under proper conditions then the act is lawful. But its lawfulness involves the possession of an excuse sufficient in law. It is rightful because of the excuse and not *per se*. Hence, an act lawful in that sense needs no justification. And because, in that sense, it carries its own just cause or excuse with it, it is a lawful act; and so the words of Bigham, J., apply. But the justification which an act, lawful *sub modo*, carries with it must be capable of ascertainment and definition, and so the process of determining whether it is lawful requires an analysis of the right asserted. It may safely be said that in order to adjudge an act to be a proper exercise of a legal right, evidence must be given which satisfies the court that it is within the definition of Sir William Erle and is an exercise of the actor's own legal right and not merely an obstruction and so intended.

From this discussion may be gathered this axiom that the lawfulness of the acts done in the professed exercise of a legal right must in all cases be judged by the possession or absence of an actual legal right. In the one case interference causing injury gives no cause of action, and in the other it does.

Now lawfulness does not import absence or intention to injure, nor does it depend upon it. Hence malice or improper motive are not important, and when acts are scrutinized the purpose is, not to discover the underlying mental resolve, but rather the position of the actor so as to determine whether what he has done is consistent with and supports the position which he asserts to belong to him. To illustrate: The circumstances under which resolutions were passed by a sliding scale committee of the miners were considered, and the views of the executive committee were examined, in order to see whether what was done was really the executive committee's action, and not in fact that of the sliding scale committee. Glamorgan Coal Co. v. South Wales Miners' Federation (1903), 1 K. B. at pp. 126, 127.

3. *Earlier Indications of the Principle.*—Apart from what may be gathered from the Mogul case, there are indications in Allen v. Flood of the adoption of the principle of just cause or excuse. In that case, Wills J., who agreed with the majority of the house of lords, thinks (p. 48) that neither the Mogul case nor any other says that the promotion of one's own interest will justify any and every means by which that end can be accomplished, and the utmost that can be said about self-interest as a justification for doing mischief to others, is that it is one of the circumstances to be taken into consideration in determining whether there is or is not just excuse for the willful infliction of loss upon others.

Hawkins, J., who held with the minority (at p. 24), discusses the improbability of the defendant's action being dictated by a desire to protect trade interests, and is satisfied that they were not in any sense acting "in the exercise of any privilege, or in defense of any rights either of his own or the boiler maker's."

In the house of lords, where the case went off upon the weight to be attached to the presence or absence of malicious intent there is throughout the judgment an appreciation of the effect of lawful competition as an excuse for injury not limited to trade competition, but as extending to competition in labor. And Lord Herschell's already quoted remarks show that the effect of the exercise of a competing right is fully recognized. Lord Macnaghten, in Quinn v. Leatham, may be said to have fully defined the law on this head when he said (p. 510) that the violation of a legal right committed knowingly is a cause of action * * * if there be no sufficient justification for the interference—which is equivalent to stating the proportion that the interference is wrongful if not supported by the possession of an existing legal right.

4. *When Acts Require Justification.*—The acts to be justified may be those of a single individual or they may be those of individuals similarly interested tending to the same end but without agreement. They may be the concerted acts of members of an association. The very agreement to do them may be in itself the act to be excused, because the acts may be in themselves lawful. See Mulcahey v. Reg., L. R. 3 H. L. p.

317 and Quinn v. Leatham, *ante*. And the results of the acts may be the breaking of a contractual relation, or the preventing of bargains necessary to the carrying on of business, or they may affect the health, comfort, peace of mind, business or profits of an individual or of a company. Consequently the justification may have to be sought for in many different rights and from many and varied relationships. It is impossible to classify either the acts or the excuses in any useful way and examples will have to indicate a rough and ready rule.

The courts have refrained from attempting to lay down any rule as to when justification exists. Both Stirling and Romer, L. JJ., think it well nigh impossible. Glamorgan v. South Wales, *ante* at pp. 573, 577, and Lord Bowen's test in the Mogul case is the "good sense of the tribunal." Both Bigham, J., in the court below and Lord Justice Vaughan Williams, in his dissenting judgment in the court of appeal (Glamorgan case [1903] 1 K. B. 118, 2 K. B. 545) discuss the question of the right of an individual to counsel another, where in consequence of such advice a contract is to be broken or may be prevented. Bigham, J., cites the case of a brother advising a sister to break a contract of service which is injuring her health, and also cases where advice as to whether or not it is wise to break a contract is honestly asked and is honestly given by solicitors, parents or friends. He concludes that if from all the circumstances it appears that the interference was justified, a cause of action does not exist against the adviser. It is of course obvious that if the advice is taken and the contract broken an action lies against the person breaking the contract. Lord Justice Vaughan Williams in considering the cases referred to is of the opinion that the principle by which they are covered is that a community of interest or a duty arising from the relation of the parties affords a just cause or excuse. But self-interest is not in itself and apart from other considerations a complete justification. Wills, J., in Allen v. Flood, at p. 480, speaks of it as only one of the circumstances to be taken into consideration in determining whether there is or is not just cause or excuse. Lord Herschell in the same case (p. 129) alludes to furthering one's own interest as good cause if resort is not had to unlawful acts. And Bigham, J., in the Glamorgan case (1903), 1 K. B. 118 at p. 134 agrees in these words: "If the real object were to enjoy what was one's own or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without illegal acts it would not, in my opinion, properly be said that it was done without just cause or excuse, but not if done merely with the intention of causing temporal harm without reference to one's own lawful action or the lawful enjoyment of one's rights."

Romer, L. J., in the Glamorgan case (p. 574), points out that a community of interest is no answer to an action for procuring a breach of contract.

Stirling, L. J., admits (p. 577) the force of the argument that duty may protect, but is evidently of opinion that if the fulfilling of the duty to advise carried the adviser into active interference with an existing contract he would be liable.

It is obvious that community of interests as an excuse shifts the ground from the sole interest of the offending party in exercising his legal right. It either admits a right of outside interference with a matter in which another party is exercising his individual right or brings in the moral excuse of filial, fraternal or friendly duty instead of an existing and recognized right.

Until the house of lords has spoken it is impossible to say to what extent and under what circumstances a defense will be established by the duty to advise or to actively interfere. In such cases as are illustrated by the one so forcibly cited by Stirling, L. J. (a father causing a child to break off a marriage engagement with a person of immoral character), a difficult problem is suggested. It may be that the right to physical health and the enjoyment of life to which every one is entitled (which in itself forms a valid excuse for breaking a contract) will inure to protect those who act to secure it. In the meantime, and speaking of cases in which only money interests are involved, it is extremely doubtful whether community of interest will be sufficient as a defense, though it may be a prime factor in determining the actual relationship of the parties.

The divisional court in Read v. Friendly Society (1902), 2 K. B. 88, have laid down what seems to be a fairly comprehensive rule. They hold that the justification which will be sufficient to exonerate a person from liability for his interference with the contractual rights of another must be an equal or superior right in himself, and it will not be sufficient for him to show that he acted *bona fide* or without malice, or in the best interests of himself or others, or on a wrong understanding of his rights.

The case of the Mogul Steamboat Co. v. McGregor Gow & Co. (1892), A. C. 25, established, in a popular sense, competition in trade as a justification. But the learned judges are careful to point out that the case may be supported upon the ground that no legal right of the plaintiffs was infringed. It was really a case of competing rights of trading and the effect of it is that the defendants used their right to do business so as not to infringe the rights of the plaintiffs, though to their detriment. If the defendants had, under the guise of trade competition, used firearms to keep off those desiring to serve the plaintiffs they could not plead that as a justification. Yet those means were actually used in Tarleton v. McGawley, 1 Peake, N. P. C. 270. The effect was precisely the same in both cases and the plaintiff's right invaded, if any were infringed, was exactly identical. It is in the excuse that the difference lies. In one case trade was pushed by trade

methods, in the other by practices not recognized as lawful, except where trading is superceded by war. They were, as Lord Holt pointed out in Keeble v. Pichersgill, 1 Mod. 74, 131, done in the way and under the guise of competition, yet were in themselves violent and unlawful.

5. *Cases Where Justification Disallowed.*—Upon the complicated questions always arising out of combinations in which various interests become involved, three cases may be looked at. They present the same problem in different ways. They are: Read v. The Friendly Society (1902), 2 K. B. 88, 732; Giblan v. National Amalgamated Labourers Union (1903), 2 K. B. 600; Glamorgan Coal Co. v. South Wales Miners Federation (1903), 1 K. B. 118, 2 K. B. 545; to which may be added Lyons v. Wilkins (1896), 1 Ch. 811.

These were all cases of procuring breaches of contract. The defendants in each were a federated body of workmen, and the disputes were actual ones carried on in what was believed to be the true interest of the working class and the federations.

In the Read case the federation compelled the employer to dismiss an apprentice, thereby procuring the breaking of a contract between the latter and his employer. The justification put forward was the interest of the union and the fact that the employer had agreed with the federation not to employ apprentices except in conformity with their rules. They claimed the right to compel him to perform his contract.

In the Giblan case the wrong done was both causing the plaintiff to be dismissed from his employment, and also in preventing him from obtaining further employment. The justification put forward was the fact that the plaintiff had embezzled funds of the union and that it was in its best interests that he should be prevented from obtaining employment until restitution was made.

In the Glamorgan case the injury was a breach of contract in that the miners stopped work on several days as ordered by their committee, and the justification alleged was that the stop days were ordered for the purpose of keeping up the price of coal and in that way benefitted the colliery owners (the plaintiffs), and that their action was not intended to injure the latter, but rather to benefit them, and only to interfere with the middlemen, who were selling coal at too low a rate.

In the case of Lyons v. Wilkins the same absence of desire to injure the persons who actually suffered damage, and the same intention to injure a third party, existed. The justification set up was that a trade dispute actually existed, which, although not involving the person injured, had to be dealt with in such a way as affected him, though there was no desire to injure him.

It will be observed that the interest of a combination or union as a justification runs through all of those cases. In the Read case the interests of the union were involved, because, unless they could control the employment of apprentices, a large portion of the power of their union would be gone. In the Giblan case the interest of the association was only collaterally involved, that is, the plaintiff's obtaining employment was no direct detriment to the union. Their action was intended as a punishment to him, and it is evident that it was not taken simply for the purpose of protecting employers against a dishonest employee, or because the union men were refusing to work with him. If they could succeed in preventing the plaintiff from obtaining employment they would secure re-payment into the funds of the association of the amount which had been stolen, or, at all events, they honestly expected so to do.

In the Glamorgan case and in Lyons v. Wilkins the intention to injure existed, but not against the plaintiff, and in the latter case it was only intentional so far as it was the natural result of the action taken against the person whom it was desired to injure. It is interesting to notice how the doctrine of justification is applied under these varied circumstances.

In the first, honest belief that the action taken was in the best interests of the association was disallowed as a justification. Collins, M. R., says (Read v. The Friendly Society, p. 737): "Belief, however honest, that, in what they did, they were acting in the best interest of the society of masons, could be no excuse for trying to deprive the plaintiff of the benefit of the advantage of his contract." "Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action (Lumley v. Gye, 2 E. B. 216) and strong belief on the part of the persuader that he is acting for his own interests does not seem to me to improve his position in any respect. Still less can it do so when he does not confine himself to persuasion, but joins with others to enforce their common interests at the plaintiffs' expense by coercion."

In the Giblan case the difference between the direct and intimate interests of a union, and advantages merely collateral is emphasized. Walton, J., in his judgment (reported in 89 L. T. 386) points this out. Having regard to the Mogul case, he says: "I do not think this would be an actionable wrong if it were done for the purpose of protecting or advancing the interests of the members of the union, as, for instance, for the purpose of securing more work or better wages for themselves, even though a necessary consequence of such action would be to injure the plaintiff. In Quinn v. Leatham it would be an actionable wrong if it was done, not to advance the interests of the members of the union, except perhaps in some remote or indirect way, but directly and primarily for the purpose of injuring the plaintiffs and as the jury have found that the object was to punish the plaintiff for not re-pay-

ing the moneys, the case falls within Quinn v. Leatham and not within the Mogul case."

In the court of appeal, Romer, L. J., says that this is not a case where the defendants, knowing of the plaintiff's defalcation thought it their duty to inform the employer, or where the plaintiff's fellow-workmen by reason of that act refused to work with him. It was rather a case where the intention was to carry out some spite against the man, or had for its object to compel him to pay a debt, or any similar object, not directly connected with the case, against the man, and the defendants were liable to the man for the damage consequently suffered as being an inexcusable interference with the man's ordinary right of citizenship. The case is further noteworthy for holding that a union is liable where the acts done were by persons in the service of and for the benefit of the union, though not directly authorized by it to do as they did.

In the Glamorgan case and in Lyons v. Wilkins the point established is that even where the honest belief existed that the interests of the men required the objectionable course to be pursued, and although there was not only no intention to injure the plaintiffs, but a belief that the course taken was for their benefit as well, yet if injury ensued the union were liable. Romer, L. J., says (p. 575) that what the defendants have to justify is their action, not as between them and the members of their union, but as between themselves and the plaintiffs the employers. And Stirling, L. J. (p. 578), holds that, although the men persuaded themselves that it was in their master's interest as well as their own that they should have power to take holidays at that period, this was a point on which the masters were entitled to have their own opinion.

6. *Matters of Excuse.*—Lord Brampton in Quinn v. Leatham, dealt with this vexed question of just cause or excuse where a combination of men act in regard to what they consider their mutual interests. He indicates (p. 528) what might protect them, and suggests the following: (1) Acts done in furtherance of any of the lawful objects of the association as set forth within registered rules; (2) in support of any lawful right of the association or any member of it; (3) to obtain or maintain fair hours of labor or fair wages; (4) to promote a good understanding between employers or employed, and workmen and workman; (5) or for the settlement of any dispute. Lord Lindley in the same case points (pp. 536, 537) to many acts for which no justification exists. They are: (1) giving a black list; (2) dictating to the plaintiff and his customers and servants what they were to do; (3) disturbing them in their employment of liberty of action and he refers (p. 541) to acts which are forbidden by law, such as picketing, besetting and threatening.

In Boots v. Grundy, 82 L. T. 769, Phillemore gives instances of what is or is not just cause or excuse. Political or religious hatred, a spirit of revenge for previous real or fancied injury are not accepted as valid, but to further one's own prosperity or if the act be constructive, or destructive only a as means of being constructive then sufficient excuse exists.

7. *Conclusion.*—In closing it may be interesting to note the view of Romer, L. J., in the Glamorgan case and what he thinks ought to be considered in determining whether just cause or excuse does or does not exist.

Those elements are: (1) the nature of the contract broken; (2) the position of the parties to the contract; (3) the grounds for the breach; (4) the means employed to procure the breach; (5) the relation of the person procuring the breach to the person who breaks the contract, and (6) the object of the person in procuring the breach.

To this must be added that vitally important factor, namely, the effect of combination as distinguished from the results of individual acts. A combination cannot act with as free a hand as an individual — as has been said, a baker can refuse to supply me with bread, but if all the bakers combine to refuse me bread their agreeing becomes a conspiracy to injure me. Hence, in dealing with just cause and excuse, it is obvious that where two or more combine to do an act causing injury, their defense will be scrutinized more keenly and will always lack one advantage possessed by an individual, namely, the innocence of the means used.

Mr. Chalmers-Hunt, the great English authority upon this subject has propounded a view which, speaking generally appears to afford the best view point for considering just cause or excuse. It is that the right to attack persons for the sake or by way of competition is an indulgence conferred by the law, and, being in itself an evil, although a necessary one, its exercise is to be jealously limited and confined so as to exclude from protection acts of manifest tyranny and malice.

This puts the onus where it properly belongs, and if adopted by the courts the doctrine of necessary evil will put at rest a much agitated branch of modern law. It bears an interesting resemblance to the use of privilege as a defense in actions for libel and slander.

The American view may be put side by side with that of Mr. Chalmers-Hunt. Mr. Eddy, in his recent work on Combinations, says (1901 Ed. par. 470): "But when it clearly appears that there is an entire absence of legitimate motives, and that the damage is occasioned by acts which are the result of a deliberate intent to injure, then the law has, or should have, no difficulty in stamping the transaction, considered as an entirety, unlawful, and awarding the party injured whatever damages he has suffered. Such a conclusion does not involve the proposition that malice in and of itself is a cause of action, since a man may do many things not in themselves unlawful in the legitimate pursuit of his own lawful business, but at the same time with the mali-

cious intent to injure others; but a man may not do wantonly and without any hope or expectation of profit or legitimate advantage to himself that which he knows must and which he intends shall inflict damage upon another. The practical question for court and jury is not so much whether or not malice exists, as it is whether or not the acts complained of were done in the legitimate pursuit of a legitimate business, or the legitimate exercise of some personal privilege; if so, then there is no redress for the party injured, since the law cannot undertake to distribute the damage according to the preponderance of the motives."—Frank E. Hodgins in the *Canada Law Journal*.

WHAT CONSTITUTES A COMPLETE TRANSFER OF STOCK AS AGAINST THIRD PARTIES.

It would seem to a lay or even a professional mind, at first glance, that the law regulating a subject of such importance, so heavily freighted with dollars and presenting such abundant opportunities for fraud, should be well settled. As a matter of fact modern commercial demands, calling for more facility in the transfer of this paper which has become such a potent business appliance, have pressed the opposing lines of the conservative common law with varying degrees of energy in the different states. The result is a mass of decisions differing in degree and generically. Some are controlled by statutes requiring stock to be transferred to the purchaser or pledgee, on the books of the corporation, before a sale or pledge of such stock is valid for any purpose; in several states statutes providing that stock shall be sold only by transferring the same on the books of the corporation, are held to be for the protection of the corporation and purchasers of such stock who fail to register the transfer are protected as against subsequent attachment and execution creditors, even though such creditors have no notice of the prior sale or pledge; in other states similar statutes are held to be for the protection of creditors at large, and attachments and executions are given precedence over prior, unregistered transfers of stock; in still others the common law is interpreted as requiring for the valid assignment of incorporeal property, as complete a delivery as the thing is capable of, which, in the case of stock, is held to be a transfer on the books of the corporation; in still other states the reverse is held. These different statutes and decisions are referred to below.

As by the common law choses in action are not available to execution or attachment creditors, their availability depends on statutes. In practically all of the states statutes subjecting this kind of property to the claims of debtors, are now in effect. In the early history of the law on this subject, and immediately after these statutes had begun to appear, the question arose as to what was necessary to constitute an assignment or pledge of stock valid as against creditors.

The end sought to be reached by the common law in transfers of property was the utmost facility consistent with the rights of third parties. The rights of third parties was attained by placing around such transfers formalities which gave to the world notice of actual ownership and eliminated the possibility of secret titles.

Extending this rule to stock in corporations, the court in an early Massachusetts case,[1] said: "I do not stop to ask what particular act would constitute a transfer; whether it must be entered on the books or whether a delivery of the certificate by the holder, ready to transfer or with a written transfer executed, so that nothing remains but the mere executive act of the clerk, is sufficient. In either case it would show who is, at the time, the actual owner by the books and inform the creditor or other person having occasion to inquire or right to know. It is unnecessary to fix some act or some point of time at which the property changes. And it will tend to the security of all parties concerned to make that turning point consist in an act, which whilst it may be easily proved, does at the same time give entirety to the transfer. It would seem to us to be going out of the rules of just exposition to hold that a plain provision of statute laws calculated to promote the security of important legal rights to parties in important particulars, should be construed to be a regulation made for the convenience and protection of banks."

To the same effect is an early New Hampshire case where the court said that a transfer on the books was necessary to complete the assignment; that there must be such a change as the thing is capable of; that other-

[1] Fisher v. Essex Bank, 5 Gray (Mass.), 373.

wise the seller would be enabled by means of an apparent ownership to obtain a fictitious credit and deceive both creditors and purchasers.[2]

This view of what was demanded by public policy and the law was not universally accepted. In Broadway, etc., Bank v. McElrath,[3] the court said: "The pledge of stock as collateral security has become a prevalent and, to the borrower especially, an advantageous mode of effecting loans. In manufacturing companies, especially where the business of the company is carried on by the stockholder, and where his capital is mainly or exclusively vested in the stock and employed in the active operations of business, the pledge of stocks affords the most ready and advantageous mode of effecting loans for the demands of business. To require the transfer of the stock to the lender, as security for the loan against the right of attaching and execution creditors will at once destroy the value of the security or compel the borrower to divest himself of his character as corporator, and forfeit his control of the business of the corporation. * * * Why should the owner of stocks be deprived of the privilege of mortgaging or pledging his stock for the security of a loan without stripping himself of all his rights of ownership, more than the owner of any other property."[4]

It may be well to mention here that it has been held that it is not necessary to transfer national bank stock on the books, even in states where the opposite rule has been given effect as to other stock.[5]

The distinction that is apparent between these two early decisions has been maintained in greater or less degree, as the growth of corporate interests has caused certificates of stock to invade the realm of commercial paper. In many states different reasoning has been employed to reach the same result. Various opinions have been written as to the intention and scope of statutes regulating the transfer of stock and of provisions in charters and by-laws for that purpose. The best classification obtainable of the states as to the *status* of the law on this subject, is that of Cook, made in 1903,[6] as follows: In New York, Pennsylvania, Michigan, Minnesota, Missouri, Delaware, Nebraska, Tennessee, Kentucky, Louisiana, Mississippi, Texas and Washington, it is held that, by the common law a transfer of stock for value will be protected from the subsequent attachment or execution, even though the transfer is unregistered.[7] In Illinois, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, West Virginia, Wisconsin and Wyoming, the holder of unregistered transferred stock is protected from attachment and execution creditors by statute.[8] In Alabama, Arkansas, California, Colorado, Connecticut, Indiana, Iowa, New Mexico and Vermont, the statutes and provisions in charters and by-laws are interpreted as giving attachment and execution creditors the right over prior, unregistered transfers.[9] In California it has

[2] Pinkerton v. R. R., 42 N. H. 424. See also Hawes v. Gas Consumers' Benefit Co., 9 N. Y. Supp. 490; Citizens' National Bank v. Cincinnati, etc., 11 Weekly Law Bulletin, 86; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 2 L. R. A. 836; Nisbit v. Macon B. & F. Co., 12 Fed. Rep. 686; Henkle. v. Salem Mfg. Co., 39 Ohio St. 347; Jones v. Latham, 70 Ala. 164; Farmers' National Bank v. Wilson, 58 Cal. 600; State Ins. Co. v. Sax, 2 Tenn. Ch. 507; *In re* Murphy, 51 Wis. 519.

[3] 13 N. J. Eq. 24.

[4] See also Finney's Appeal, 59 Penn. St. 398; Commonwealth v. Watmough, 6 Whart. 117; Rogers v. New Jersey Ins. Co., 8 N. J. Eq. 167; De Comeau v. Guild, etc., Co., 3 Daly, 218.

[5] Sibley v. Quinsigamond National Bank, 133 Mass. 515.

[6] Cook on Corporations (5th Ed.), chap. 27.

[7] Smith v. American Coal Co., 7 Lans. 317; Eby v. Guest, 94 Pa. St. 160; Broadway Bank v. McElrath 13 N. J. Eq. 24; Michigan v. Cleland, 117 Mich. 45; Lund v. Wheaton, etc., Co., 50 Minn. 36; McClintock v. Central Bank, 120 Minn. 127; Farmers,' etc., Bank v. Mosher, 88 N. W. Rep. 552 (Neb. 1901).

[8] The Massachusetts statute is as follows: "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties." Mass. Acts, 1884, ch. 229. The Act excepts the corporation itself.

[9] Berney National Bank v. Pickard, 87 Ala. 577; Dittey v. First Natl. Bank, 112 Ala. 391. In Alabama the statute expressly gives the creditor the precedence unless the transfer is registered within fifteen days. In Arkansas the same is true, except the transfer must be filed with the county clerk. The statute however applies only to sales of stock. R. S., sec. 590. Fahrney v. Kelly, 102 Fed. Rep. 403; Batesville, etc., Co. v. Meyer, etc., Co., 68 Ark. 115. In California the statute provides that no transfer shall be valid for any purpose until it is transferred on the books. The same is true in Colorado, sixty days being allowed for the transfer on the books. Conway v. John, 14 Colo. 30. Colt v. Ives, 31 Conn. 25 held that where a transfer was wrongfully withheld, an attachment did not take precedence. In Indiana

been held that, although an execution creditor takes precedence over a prior pledge, unregistered, that one who purchases at the execution sale, with notice of the prior pledge, is not protected.[10]

Such a rule would make worthless the execution lien of the creditor and seems illogical. It is a well settled principle of common law that one who purchases real estate, having notice of a former equity against the property, but whose immediate vendor was an innocent purchaser, takes the title clear. The same principle would seem to demand that an execution creditor be allowed the full benefit of his lien, and that alienation be not restricted by allowing notice to his purchaser to invalidate the sale. It has been so decided in some states.[11] It has been held in states where attachment is given precedence, that notice given by the purchaser or pledgee to the corporation is sufficient to postpone the attachment;[12] also that a mere memorandum on the corporation's stock book is sufficient notice of any transfer or pledge of stock.[13] Of course, as between the parties, delivery of the certificate together with a blank power of attorney to transfer on the books, signed by the owner of the stock is sufficient. It is only as to the rights of third parties that the question arises. It is plain that the marked tendency in the decisions and statutes is toward the elimination of formalities, such as a transfer on the books. The opinion seems to be growing rapidly that public policy and convenience demands that this class of property or rather its representative, the certificate of stock, be allowed to pass from hand to hand with as much ease as does commercial paper. No less an authority than Cook[14] strongly commends this tendency and the Circuit Court of Appeals of the United States has done the same.[15]

Whether this tendency is salutary may be questioned in spite of such high sanction. That the more wealth is invested in certain kind of property the easier the transfer of that property should be made by law, is a theory t at is subject to qualifications. The law should make transfers as easy as possible, consistent with the rights of third parties. This qualification is important and is the reason for a great many formalities of the law. The purchaser of property, real or personal, has notice of the real ownership almost thrust at him by various registry acts, by statutes and decisions on notice, actual and constructive, and by the laws invalidating secret transfers and trusts.

Stock in corporations is incorporeal, personal property. It is intangible, its certificate being merely representative, and practically unavailable. The statute regulating corporations invariably provides for a stock book which shall contain the names of the stockholders, the amount of their holdings, and records of transfers and that such books shall be open to creditors, etc. This is for the protection of creditors and dealers with

in State v. Jeffersonville Nat. Bank, 89 Ind. 302, attachment is given precedence, on the ground that the pledge is not complete unless the transfer is recorded. In Iowa the statute requires registry as a condition precedent to validity except as between the parties. Lyndonville Nat. Bank v. Folsom, 7 N. Mex. 611.

[10] Weston v. Bear River Co., 6 Cal. 425; People v. Elmore, 35 Cal. 653; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600.

[11] Jones v. Latham, 70 Ala. 164; Hair v. Burnell, 106 Fe . Rep. 280. In the latter case the court of appeals for the Southern District of Iowa held an execution sale to the execution creditor, good, where the execution was levied subsequent to a transfer to a third party and where the purchaser was given notice at the time of the sale of the former transfer.

[12] Merchants' National Bank v. Richards, 6 Mo. App. 454.

[13] Moore v. Marshalltown Co., 81 Iowa, 45.

[14] Cook on Corporations (5th Ed.), sec. 490. "It may be added in regard to this whole subject, that the decisions and statutes of the various states show clearly that public policy and the legitimate demands of trade have gradually caused the courts and legislatures of the various states to establish the rule that a sale or pledge of certificates of stock has precedence of a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the pledgee or purchaser of the certificate to obtain a registry on the corporate books, is not fatal to his interest in the stock. In the great commercial centers where certificates of stock pass from hand to hand and are pledged to banks and financial institutions daily to secure great sums of money, the necessity of such a rule is imperative."

[15] Masury v. Arkansas National Bank, 93 Fed. Rep. 603. In this case the court says: "In the great majority of cases when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions and that the public interest is best subserved by removing all restrictions against their circulation and by placing them as nearly as possible on the plane of commercial paper."

the holders of stock, but such regulations are nullified by any rule which gives the certificate a degree of negotiability almost, if not quite as great as a promissory note.

The view taken by these modern authorities, namely that, because so much property is becoming vested in stocks, because it is so convenient for collateral, and because so many millions are passing from hand to hand daily by mere delivery and execution of power of attorney in blank, public policy demands that the transfer be facilitated, is not altogether consistent. The premises are true, but the conclusion does not necessarily follow. It might well be suggested that the fact that so much property is now in this incorporeal, intangible form, and so much more is rapidly getting into this form, is the very reason why it should be made harder instead of easier of transfer.

Is it not the policy of the law that the transfer of property which is hard to trace, easy to secrete and which lends itself from its very nature, to secret trusts and frauds, should be accompanied by some legal requisites sufficient to constitute notice of actual ownership? If this is true, if third parties are entitled to know who is the actual owner, obviously the books of the corporation is where it should be found.

Such requisites would doubtless entail some inconvenience to banks and business men accustomed to taking and giving collateral, but probably no more so than a borrower on real estate is compelled to submit to by the necessity of recording his mortgage. Convenience is not necessarily public policy. More often inconvenience and public policy are identical, especially where convenience tends to facilitate fraud. Taking this view of it itseems that the tendency commended in Masury v. Arkansas Nat'l Bank, *supra*, is not salutary.[16]

Certificates of stock are no doubt valuable aids to revenue raising by way of collateral. So much so that in many cities stock is given and accepted as collateral for large amounts, without the formality of a transfer on the books to the pledgee, in spite of the law holding such pledges invalid as against a subsequent attachment or execution.

In Indiana the last decision on the subject held that a pledge of stock was not complete, where transfer on the books was not made and that an attachment took precedence against a prior, unregistered transfer.[17]

In spite of the fact that this is doubtless the law in Indiana, the contrary is the usage. The president of one of the leading banks in Indianapolis expressed it as his belief that of the millions of dollars held as collateral in Indianapolis, practically none of it has been transferred to the pledgee on the books of the corporation, or even notice that it was held as collateral appended to the stock book. When the question gets into the courts of last resort again, doubtless this universal custom, usage and convenience will be urged, together with the decisions in other states, as cause for changing the law in Indiana. Such is the legislative and judicial functions of custom and usage.

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[16] For articles for and against the policy commended in Masury v. Arkansas National Bank, respectively, see 12 Ry. & Corp. L. J. 145, and 30 Am. Law Rev. 223.

[17] State v. First National Bank, 89 Ind. 302. On page 311 the court say: "If, as found by the court, Hawley, at the time the levy and sale were made, held the stock in pledge, he must have appeared upon the books of the bank as the owner of said stock. He could not have so held it in pledge unless it had been transferred to him on the books of the bank by David S. Koons before said levy and sale." Citing Wilson v. Little, 2 N. Y 443; Bowman v. Wood, 15 Mass. 534; Story Bailments, sec. 290; Brewster v. Hartley, 37 Cal. 15.

REMITTITUR ON APPEAL—PERSONAL INJURY CASE.

ALABAMA GREAT SOUTHERN R. CO. v. ROBERTS.

Supreme Court of Tennessee, October 8, 1904.

Where the only error is the amount of damages awarded, evincing passion, prejudice, or caprice, the court on appeal may, in an action for personal injuries, require a *remittitur* as a condition of affirming; this not being an evasion of the rights of the parties, or the province of the jury, or an exercise of original jurisdiction.

WILKES, J.: These are two separate cases heard together in the court below by consent, and involving damages for personal injuries caused by a collision between the cars of the Rapid Transit Company and the Alabama Great Southern Railroad Company. The plaintiffs are both minors, Faustina at the time of the injury being about 13 years of age, and Edista being about 9 years old. The suit was brought for

the benefit of the minors by their father as next friend against the Alabama Great Southern Railroad Company, the Rapid Transit Company, and the Belt Line Company. There was a verdict in favor of the latter two, but against the Alabama Great Southern Railroad Company, in favor of Faustina for $2,000, and in favor of Edista for $800, and the railroad has appealed and assigned as the only error that the verdict in each case is so excessive as to evince passion, prejudice, or caprice on the part of the jury. Counsel for the railroad company admitted that his company was liable for some damages, and expressed his willingness to pay what was reasonable, and that the jury might fix the amount.

There was no claim made in the case for vindictive, punitive, or exemplary damages. The court ruled below that only compensatory damages could be received under the agreement of the parties, and to this there was no exception by plaintiff.

The court charged the jury to take into consideration the mental and physical pain and suffering resulting to each from the accident, and let their verdict be for a reasonable compensation for the actual injuries sustained in each case, taking into consideration the mental and physical pain and suffering, and from the proof determine whether the injuries received were permanent or temporary, looking to the proof to ascertain the nature, character, and extent of the injuries in each case, and from the proof make up their report. No exception was made to this charge in the court below, nor is any made in this court.

Counsel for the plaintiff, in his brief, states that the proof in the court below was confined to the mere question of compensatory damages, and not subject to the assignment that it is so excessive as to evince passion, prejudice, or caprice on the part of the jury.

We have before us, therefore, cases of verdicts upon facts which, it is conceded, make a case of liability in which the element of exemplary or punitive damages is not involved, but only what is compensatory for personal injuries. The liability of the defendant being conceded, the only question is whether the amounts found by the jury for the two girls are so excessive as to evince passion, prejudice, and caprice on the part of the jury; and in our opinion they are so excessive as to fall within the rule, and should be abated—that of plaintiff, Faustina, from $2,000 to $1,250, and that Edista of from $800 to $400; and for these amounts only, together with all costs, are they entitled to judgment.

This court therefore suggests to plaintiff's counsel that the recoveries be reduced to these amounts; and, in the event they consent thereto, judgments will be so entered, and 10 days is granted to them, and each of them, respectively, to accept or reject this suggestion. In the event either of said plaintiffs, by their attorneys, shall not accept this suggestion of the court, and agree thereto, the judgment of the lower court will be reversed as to such one, and a new trial awarded as to her, and the appellee not agreeing will pay costs of her appeal.

Inasmuch as this is to some degree a new practice in Tennessee, the court deems it proper to state the reasons for adopting it and the law applicable to it.

It has heretofore been held that, when a verdict of a jury is special and a certain part thereof is not lawfully recoverable, this court will allow the verdict to stand if a *remittitur* is entered as to the objectionable part. Memphis v. Kimbrough, 12 Heisk. 133.

So when there is apparent an error of calculation in an action of debt, this court will not reverse and remand, but will remit the erroneous part. McKinley v. Beasley, 5 Sneed, 170. See also, Railroad v. Wallace, 91 Tenn. 35, 17 S. W. Rep. 882.

When the judgment in the court below is for an amount greater than that laid in the suit and declaration, the court will reverse unless the appellee remit the excess, as he might have done in the court below. Crabb's Ex'rs. v. The Bank, 6 Yerg. 332.

So when a verdict is based upon several items, and is divisible, this court may remit so as to reduce the total amount by such items as have been improperly allowed by the jury. Railroad v. Wallace, 91 Tenn. 35, 17 S. W. Rep. 882.

This is perhaps the full extent to which this court has heretofore gone in causing or suggesting *remittiturs*; and the usual practice in damage suits for personal injuries, when there is a gross verdict or judgment to cover all damages, has been, in case the verdict is so excessive as to evince passion, prejudice, or caprice on the part of the jury, to set aside the judgment and verdict and award a new trial.

The consequence has been to prolong litigation, to swell bills of cost, to delay final adjudication, and, in a large number of instances, to have such excessive judgments repeated over and over, upon the new trial.

It is believed that this is a result which may be remedied by adopting the practice herein suggested, and which already prevails in the majority of the states of the Union. This practice will conform to that of the court below, and we can see no good reason why it should not prevail.

The rule in the lower court is that the trial judge may suggest a *remittitur* to the plaintiff, and, if he assents thereto, he may avoid a setting aside of the verdict and a new trial. Branch v. Bass, 5 Sneed, 366.

But such *remittitur* cannot be entered over the protest of the successful plaintiff, and if he do not assent thereto the circuit judge must set aside the judgment and grant a new trial. Massadillo v. Railway Co., 89 Tenn. 661, 15 S. W. Rep. 445.

The general rule is stated as follows: The trial judge may, as a condition of denying the motion for a new trial, made by the defendant in

an action of debt, require a *remittitur* of part of the verdict which he deems excessive, but it is optional with the plaintiff to comply with such condition or suffer a new trial. Young v. Cowden, 98 Tenn. 588, 590, 40 S. W. Rep. 1088, citing Branch v. Bass, 5 Sneed, 366; Railroad v. Jones, 9 Heisk. 27; Massadillo v Railroad Company, 89 Tenn. 661, 15 S. W. Rep. 445; Railroad v. Wallace 91 Tenn. 35, 17 S. W. Rep. 882; Railroad v. Garrett, 8 Lea, 450, 41 Am. Rep. 640; Railroad v. Foster, 10 Lea, 366; approved in Tel. Co. v. Frith, 105 Tenn. 174, 58 S. W. Rep. 118.

In Railroad Company v. Garrett, 8 Lea, 438, 41 Am. Rep. 640, it was held to be an error, but not reversible under the facts of that case, to require a *remittitur* if the defendant would abide by the judgment and not appeal, and when the defendant would not agree the judgment was allowed to stand.

The defendant in case of *remittitur* cannot be required to abandon or waive his right of appeal, as a condition to acceptance by plaintiff. Railroad v. Foster, 10 Lea, 357; Tenn. Coal Co. v. Roddy, 85 Tenn. 400, 5 S. W. Rep. 286.

These cases show the extent to which this court has gone in suggesting *remittiturs* in this court and approving *remittiturs* in the court below.

As before stated, the practice in this court has heretofore been, in cases of excessive judgments for damages for personal injuries, to set them aside and remand for a new trial, if the verdict is so excessive as to evince passion, prejudice, or caprice. When the excess does not go to this extent, the verdict of the jury and judgment of the court below is not disturbed by this court. Tenn. Coal & Ry. Co. v. Roddy, 85 Tenn. 400, 5 S. W. Rep. 286.

The rule prevailing in a large number of states of the Union is that a *remittitur* may be required as well in this court as in the trial court. 18 Enc. Pleadings and Practice, p. 137, and authorities there quoted.

It is also laid down in 18 Enc. Pleadings and Practice, 125, that the great weight of authority is that a court may permit or require the entry of a *remittitur* in actions for unliquidated damages for torts. See cases cited.

Again it is said: "It is a very common practice for an appellate court, when it deems the damages excessive, and this is the only error, to require a *remittitur* of the amount considered excessive as a condition to the affirmance of the judgment."

In support of this a large number of cases are cited from the following states: Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, Ohio, Oregon, Texas, Washington, Wisconsin, and cases from the federal and United States supreme court.

In many of these states the rule has been adopted in later cases over a contrary holding in earlier cases. Notably is this the case in Missouri, as is shown by the case of Burdict v. Missouri Pacific Ry. Co., 123 Mo. 221, 27 S. W. Rep. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528.

This is a well considered case and extensively annotated, and the different holdings in the several courts are distinguished and illustrated. In some states, as in Louisiana, it is held that the court has power to cut the verdict without the assent of the parties; but the great weight of authority is that it cannot be done over the protest of the successful plaintiff. See our own cases heretofore cited, especially Massadillo v. Railroad Company, 89 Tenn. 661, 15 S. W. Rep. 445. The doctrine of *remittitur* applies to damages in torts as well as to damages for breach of contract. The judge may set aside the verdict in such cases *in toto*. In follows that he may determine what would be a reasonable amount. Such is not the usurpation by the court of the province of the jury. The facts have been passed on by a jury, and the right to recover has been determined by the jury, and not by the court. The judge expresses his opinion as to the reasonableness of the amount, the plaintiff accedes to the justice of the judge's estimate, and agrees to accept it; and, while the judgment is for an amount smaller than that found by the jury, it is a judgment based upon facts which the jury have found fixes liability, and not upon facts found by the court. Branch v. Bass, 5 Sneed, 369; Young v. Cowden, 98 Tenn. 589, 40 S. W. Rep. 1088; Arkansas Valley Land Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. Rep. 458, 32 L. Ed. 854; 18 Enc. Plead. and Prac. 127; Burdict v. Mo. Pac. Ry. Co., 123 Mo. 221, 27 S. W. Rep. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528.

It may be said that this practice of requiring a *remittitur* is the exercise of original jurisdiction by this court; and in the same connection it may be said that, if this court has the right to reduce the judgment of the court below, it has the right to increase it. Neither of these objections are well grounded. This court cannot, and does not, render any judgment as an exercise of original jurisdiction when it reduces the verdict and judgment of the court below. It merely reviews and corrects the judgment rendered to the extent of the excess; and as to this excess, it may very well be said there is no evidence to sustain it. But it can not give judgment for an amount in excess of what the jury has found, which the jury has not found, for that would be the exercise of original jurisdiction.

In the cases of Hutchins v. St. Paul, M. & M. Co., 44 Minn. 5, 46 N. W. Rep. 79, it is said in substance, that, while no court has any right to substitute its own estimate of the damages for that of a jury, yet it has the right to determine the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict.

In a number of cases it has been held that when the damages are so excessive as to evince

passion, prejudice, or caprice, the error cannot be corrected by *remittitur*, because such passion, prejudice, and caprice will be presumed to have permeated the entire verdict, and to have influenced or caused the finding of the question of any liability on the facts.

See cases cited in 18 Enc. Plead. and Prac. 144.

We cannot admit the soundness of the view of these cases under our practice. If a jury, through passion, prejudice, and caprice has given a judgment, whether excessive or not, when the facts do not warrant any judgment, it is the practice of this court to set aside the verdict because there is no evidence to support it.

But when the court can see that there is liability, and especially when that liability is conceded for some amount, as in the present case, and the only error is the amount of damages awarded, certainly there is no good reason to set aside the verdict *in toto* if justice and right can be reached by reducing the damages. There may be cases where a verdict for any amount whatever would evince passion, prejudice, or caprice, and these cases can readily be reached under the rule of this court to reverse when there is no evidence to support the verdict. The courts are not uniform in the mode of submitting or requiring *remittiturs*, and the practice in each state is modified by other rules touching the same errors.

We are of the opinion, therefore, that it is good law, sound policy, and no invasion of the rights of parties or the province of the jury, and no exercise of original jurisdiction, to adopt the practice of requiring *remittiturs* in this court at the option of the appellee, to the end that justice may be reached and an end put to litigation.

NOTE.—*Right of Appellate Court to Reduce the Amount of Recovery.*—To permit an appellate court to usurp the functions of a jury and determine an appeal the amount of recovery in any specified instance where the exact amount of the recovery is altogether unascertainable, is to our mind a practice that is fraught with danger and is entirely subversive of one of the most important rights of trial by jury, *i. e.*, the right to have the amount of recovery fixed by the men who have heard the witnesses and looked upon the plaintiff and beheld vividly the extent of her injuries, rather than by the members of an appellate tribunal who cannot, by any possibility, gain an adequate idea of the extent of the injuries or of the amount necessary to fully compensate the injured party. No such objection can be made to the action of an appellate tribunal in this regard where the amount of the recovery is easily ascertainable, and in such cases the law is now well settled that the appellate court may reduce the amount of recovery to what is to be considered a more correct computation of the damages sustained by the injured party. The authorities are very numerous, not permitting of exhaustive citation. We shall cite the following: Coverdill v. Seymour (Tex. 1900), 57 S. W. Rep. 635; State, etc., Co. v. Cochran (Cal. 1900), 62 Pac. Rep. 466; Ivenson v. Caldwell, 3 Wyo. 465, 27 Pac. Rep. 563; Chapman v. Beltz Co. (W. Va. 1900), 35 S. E. Rep. 1013; Salida v. McKenna, 16 Colo. 523; King Co. v. Perry, 5 Wash. 536, 32 Pac. Rep. 538; Minchrod v. Ullmann, 163 Ill. 25, 44 N. E. Rep. 864; McFadden v. Swinerton, 36 Oreg. 336, 59 Pac. Rep. 816; Lear v. McMillen, 17 Ohio St. 464; Indianapolis, etc., Co. v. Holt (Ind. 1895), 41 N. E. Rep. 703; Genet v. Canal Co., 163 N. Y. 173, 57 N. E. Rep. 297; Bloom v. Insurance Co., 94 Iowa, 359, 62 N. W. Rep. 810; Barker v. Wheeler, 60 Neb. 470, 83 N. W. Rep. 678; Dennis v. Benfe , 54 Kan. 527, 38 Pac. Rep. 806; Becker v. Bohmert, 63 Minn. 463, 65 N. W. Rep. 728; Fraze v. Commonwealth, 17 Ky. L. Rep. 347, 30 S. W. Rep. 1014; State v. Hope, 121 Mo. 34, 25 S. W. Rep. 893; Carberry v. Farnsworth, 177 Mass. 398, 59 N. E. Rep. 61; Breck Smith, 44 Miss. 690; Sloman v. Guarantee Co., 112 Mich. 258, 70 N. W. Rep. 886; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. Rep. 571. Some authorities have even denied the right of the appellate tribunal to reduce the amount of recovery even in the class of cases we have mentioned. Frank v. Morrison, 55 Md. 399; Clarke v. Robinson, 15 R. I. 231, 10 Atl. Rep. 642.

Where there has been a mere error in computing the amount of the verdict under the instructions of the court, there is no question of the right of the appellate tribunal to make the proper calculation and award judgment for the proper amount so obtained. Union, etc., Insurance Co. v. Pottker, 33 Ohio St. 459, 31 Am. Rep. 555; Mock v. Walker, 42 Ala. 668; Tazewell v. Saunders, 13 Gratt. (Va.) 354; Reade v. Street, 122 N. Car. 301, 30 S. E. Rep. 124; Ketchum v. Mukwa, 24 Wis. 303; Matter of Thompson, 101 Cal. 349, 35 Pac. Rep. 991; Chandler v. Spear, 22 Vt. 388; Laurens v. McGrath, 1 Rich. Eq. (S. Car.) 296; Patrick v. Weston, 22 Colo. 45, 43 Pac. Rep. 446; Hasbrouck v. Marks, 68 N. Y. Supp. 510; Hoffman v. Bowen, 17 Tex. 506; Belford v. Woodward, 158 Ill. 122, 41 N. E. Rep. 1007, 29 L. R. A. 593; Lay v. State, 5 Sneed (Tenn.), 604; West v. Whitney, 26 N. H. 314; Montelius v. Wood, 56 Iowa, 254, 9 N. W. Rep. 212; Howard v. Richards, 2 Nev. 128, 90 Am. Dec. 520; Moores v. McConnell, 17 La. Ann. 84; Leavitt v. Bell, 59 Neb. 595, 81 N. W. Rep. 614.

Where the exact amount of the excess is easily ascertainable there is thus under the great weight of authority no objection to the appellate tribunal making the proper correction and affirming the judgment. We might at this time call attention to certain illustrations of this rule. Thus, where interest was wrongly added to the judgment, the appellate court can very easily calculate the interest and deduct it from the amount of the judgment, and then call upon the appellee to accept the deduction. Duzan v. Meserve, 24 Oreg. 523; State v. Hope, 121 Mo. 34; McKenzie v. Sifford, 52 S. Car. 270; Association v. Hitchcock, 4 Kan. 36; Brooks v. State (Tex. Civ. App. 1900), 58 S. W. Rep. 1032; Menz v. Beebe, 102 Wis. 342, 77 N. W. Rep. 913; Tomlinson v. Earnshaw, 112 Ill. 311; Railroad Co. v. Tobriner, 147 U. S. 571; Brentner v. R. R., 68 Iowa, 530; Miltimore v. Bottom, 66 Vt. 168; Bresnahan v. Nugent, 97 Mich. 359; Railroad Co. v. Wallace, 91 Tenn. 35, 17 S. W. Rep. 882, 14 L. R. A. 548. So also where the amount of the judgment is greater than that demanded by the plaintiff, the latter cannot complain if the appellate tribunal compels him to choose between a reversal of his judgment and a reduction to an amount not exceeding that requested by him in his prayer for relief. McCormick Harvesting Machine Co. v. McKee, 51 Mich. 426, 16 N. W. Rep. 796; Kerry v. Supply Co. (Cal. 1898), 54 Pac. Rep. 262; Hunnicutt v. Perot, 100 Ga. 312; Ivenson v. Caldwell, 3 Wyo. 465; Lewis v. Arnold, 13 Gratt. 454; Moore v. Republic, 1 Tex. 563; Bridge v. Livingston, 11 Iowa, 57; Smith v. Phelps, 7 Wis. 211; Garner v. Van Patten, 20 Utah, 342, 58 Pac. Rep. 684; Duncan v. Whedbee, 4 Colo. 143; Winslow v. People, 117 Ill. 152; Frankhouser v. Cannon, 50 Kan. 621; Hurd v. Germany, 7 How. (Miss.) 675; Herbert Hardenbergh, 10 N. J. L. 222; Brooking v. Shinn, 25 Mo. App. 277; Weed v. Lee, 50 Barb. (N. Y.) 354; Loverin Browne Co. v. Bank, 7 N. Dak. 569, 75 N. W. Rep. 923. So also attorney's fees or costs have been improperly added to the judgment, it is evident that the appellate court would have no difficulty in determining the exact amount of a proper judgment and is therefore entitled to correct the error provided

the appellee does not withhold his consent. Trester v. Pike, 60 Neb. 510, 83 N. W. Rep. 676; Glos v. McKeown, 141 Ill. 288, 31 N. E. Rep. 341.

In regard to judgments where the appellate court cannot easily determine the excess in the judgment as in the case of unliquidated damages our personal opinion has been already expressed in the first paragraph of this note. The tendency of the authorities, however, as noted by the court in the principal case, is gradually in the direction of drawing to the appellate court the right in every case, where a judgment is excessive and would be reversed on that ground, to accept a remttitur, and affirm the judgment. Snow v. Weeks, 77 Me. 429; Railroad Co. v. Robbins, 57 Ark. 377; Turner v. Adams, 39 Fla. 86; Phelps v. Cogswell, 70 Cal. 201; McLimans v. Lancaster, 63 Wis. 596; Mahood v. Coal Co., 8 Utah. 85, 30 Pac. Rep. 149; Cogswell v. R. R., 5 Wash. 46, 31 Pac. Rep. 411; Holmes v. Jones, 121 N. Y. 461; Bee Publishing Co. v. Publishing Co. (Neb. 1900), 82 N. W. Rep. 28; Hutchins v. R. R., 44 Minn. 5; Kroener v. R. R., 88 Iowa, 16, 55 N. W. Rep. 28; Hamilton v. R. R., 17 Mont. 334, 42 Pac. Rep. 860; Railroad Co. v. Salisbury, 162 Ill. 187; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. Rep. 696.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Consolidation. — Pendency of a suit on a benefit certificate held not to prevent suit thereon by persons made defendants to the first suit. — Clement v. Clement, Tenn., 81 S. W. Rep. 1249.

2. ACCIDENT INSURANCE — Knowledge of Insured's Employee.— Knowledge of employees of insured held not knowledge of insured, so as to enable insurer to predicate a forfeiture thereon for failure to give immediate notice of accident. — Woolverton v Fidelity & Casualty Co., 89 N. Y. Supp. 292.

3. ACKNOWLEDGMENT— Adoption of Signature. — An officer cannot lawfully take the acknowledgment of a person to an instrument, where his name is not at the time affixed to the instrument and does not appear thereon.—First Nat. Bank v. Glenn, Idaho, 100 N. W. Rep. 623.

4. ACTION—Consolidation.—Suits by different persons on the same benefit certificate held properly consolidated.—Clement v. Clement, Tenn., 81 S W. Rep 1249.

5. ADOPTION — Heirship.— Heirship, when not based on consanguinity. can be created only by a constitutional law, by which relations of paternity and affiliation are recognized between persons not so related by nature.—Albring v. Ward, Mich., 100 N. W. Rep. 609.

6 ANIMALS—Duty of Distrainer.—Where plaintiff distrained certain cows, he was under the legal duty to exercise reasonable effort to take proper care of them and dispose of the milk and account for the proceeds. — Fleetham v. Therres, Minn., 100 N. W. Rep. 877.

7. APPEAL AND ERROR—Failure to Serve Notice of Appeal.—Where no notice of appeal is served on appellee or his attorney, the appeal will be dismissed as to such party.—Rice v. Bolton, Iowa, 100 N. W. Rep. 784.

8. APPEAL AND ERROR—Harmless and Invited Error in Instruction.—Where the jury find for the defendant, the plaintiff cannot have been hurt by any error in the court's instructions as to the measure of damages.—Conant v. Jones, Ga., 48 S. E. Rep. 284.

9. APPEAL AND ERROR—Homestead, Quieting Title.—Defendant in action to quiet title to a homestead held not prejudiced by a judgment barring him from claiming an interest in the premises so long as it is occupied as a homestead.—Miller v. Stuck, Kan., 100 N. W. Rep. 552.

10. APPEAL AND ERROR—Motion to Dismiss.—Appellee, having moved to to set aside the appeal in the district court so far as it was suspensive, has no right to ask for dismissal before the supreme court on the same ground —Hannay v. New Orleans Cotton Exch., La., 36 So. Rep. 831.

11. APPEAL AND ERROR—Service of Argument —A judgment will not be affirmed for want of argument because a casualty which could not have been anticipated delayed the service of appellant's argument for a few hours beyond the time prescribed.—Buehner v. Creamery Package Mfg. Co., Iowa, 100 N. W. Rep. 845.

12. APPEARANCE—Service of Process.—No service of summons is necessary to confer jurisdiction, where defendant enters a full appearance by demurring, and later by answering —Mulholland v. Washington Match Co., Wash., 77 Pac. Rep. 497.

13. APPEAL AND ERROR —Unauthorized Appeal. — An unauthorized appeal confers no jurisdiction on the court to which such appeal is taken, except to dismiss.—Humbird Lumber Co. v. Morgan, Idaho, 77 Pac. Rep. 433.

14. APPEAL AND ERROR—Use of Word "Plaintiff" for "Defendant."—Inadvertent use of word "plaintiff" for "defendant" in instruction held not ground for reversal, where the jury could not have been misled thereby — Bowick v. American Pipe Mfg. Co., S. Car., 48 S. E. Rep. 276

15. ARBITRATION AND AWARD—Appeal.— In the absence of statute, where parties submit a controversy to arbitration, the party defeated cannot appeal. — Wilbourn v. Hurt, Ala., 36 So. Rep. 768.

16. ASSIGNMENTS—Rights of Surviving Joint-Payee.—A right of action on an obligation in favor of joint payee may be transferred by the survivor to an assignee.—Semper v. Coates, Minn., 100 N. W. Rep. 662.

17. ATTORNEY AND CLIENT—Attorney's Claim for Services.—Acquiescence in the transfer for distribution of a fund in court bars the attorney's right to seek the intervention of the court to protect his claim thereon.—*In re* Crouch's Estate, 89 N. Y. Supp. 465.

18. ATTORNEY AND CLIENT—Compromise of Suit.—Where plaintiff asked defendant for a compromise, and defendant brought no undue influence to bear, the compromise was valid, though the attorney had no notice thereof —Smith v. Vicksburg, S. & P. Ry. Co., La., 36 So. Rep. 826.

19. ATTORNEY AND CLIENT—Disbarment.—Answer in proceeding to disbar an attorney held subject to motion to strike from files for pleading evidence.—People v. Payson, Ill., 71 N. E. Rep. 693.

20. ATTORNEY AND CLIENT—Foreclosure of Attorney's Lien.—Defendant held not entitled to object to amount of fee of attorney for plaintiff in a suit to foreclose the attorney's lien.—Morehouse v. Brooklyn Heights R. Co., 89 N. Y. Supp. 332.

21. BANKRUPTCY — Composition Operating as Discharge.—An order of the bankrupt court confirming a composition made by the bankrupt with his creditors operates in itself as a discharge of the bankrupt.—Taylor v. Skiles, Tenn., 81 S. W. Rep. 1258.

22. BANKRUPTCY — Fraudulent Conveyance. — Under Bankr. Act, ch. 541, a "fair consideration" is one that is free from suspicion.—Myers v. Fultz, Iowa, 100 N. W. Rep. 351.

23. BANKRUPTCY — Fraudulent Conveyances. — A debtor's bankruptcy schedules held sufficient to establish his insolvency, as against the grantees of his property conveyed shortly before the commencement of the bankruptcy proceedings, who were not *bona fide* purchasers for value.—Saxton v. Sebring, 89 N. Y. Supp. 372.

24. BANKRUPTCY—Preferences.—The title to property held never to have become vested in the buyer, so that the seller did not by any of his acts, obtain a preference over the seller's other creditors.—Bradley, Clark & Co. v. Benson, Minn., 100 N. W. Rep. 670.

25. BANKS AND BANKING — Collection of Draft. — A bank to which a draft was sent "for collection and credit" held to take the paper in its capacity as a collecting agent for the forwarding bank.—Josiah Morris & Co. v. Alabama Carbon Co., Ala., 36 So. Rep. 764.

26. BANKS AND BANKING—Stockholders' Liabilities.—An action to enforce the individual liability of a stockholder in a national bank is governed by the statute of limitations of the state in which the action is brought. —Rankin v. Barton, Kan., 100 N. W. Rep. 531.

27. BENEFIT SOCIETIES—By-Laws.—A by-law of a beneficiary association, providing for payment of a proportion only of the insurance in case of suicide, held reasonable and enforceable.—Clement v. Clement, Tenn., 81 S. W. Rep. 1249.

28. BENEFIT SOCIETIES—Suicide.—Where a policy of insurance provides against liability for suicide in general terms, the insurer is liable if the insured was insane.—Robson v. United Order of Foresters, Minn., 100 N. W. Rep. 881.

29. BILLS AND NOTES—Delivery.—In an action by a legatee on a note made to deceased, in which defendant claimed that the note was never delivered, a receipt given a bank by plaintiff, stating that the note was left in its keeping by deceased, held properly excluded.—Gasquet v. Pechin, Cal., 77 Pac. Rep. 481.

30. BILLS AND NOTES—Discharge of Drawer of Domestic Bill.—The drawer of a domestic bill of exchange is relieved from liability under the same circumstances in which a surety would be ordinarily relieved, except that the release of the drawer is only to the extent of the injury sustained.—Bank of Richland v. Nicholson, Ga., 45 S. E. Rep. 240.

31. BONDS—Want of Consideration — Where in an action against the sureties on an undertaking on appeal, it is not alleged that the undertaking was sealed, the sureties may raise the defense of want of consideration, though it is not pleaded.—Gein v. Little, 89 N. Y. Supp. 488.

32 BROKERS—Commissions. — To entitle real estate broker to commissions, he must procure valid obligation on purchaser to buy, or bring proposed purchaser and vendor together.—Flynn v. Jordal, Iowa, 100 N. W. Rep. 326.

33. BUILDING AND LOAN ASSOCIATIONS—Foreign Corporation.—Act 1893, p. 80, ch 4158, does not relieve foreign building associations, from the general rule requiring validity of their contracts made in the state to be tested by the laws applicable to domestic corporations of like character.—Equitable Building & Loan Ass'n v. King, Fla., 37 So. Rep. 181.

34. BUILDING AND LOAN ASSOCIATIONS — Regulation Within Police Power of State.—The legislature, in the exercise of the police power, may regulate the conduct of building and loan associations, and in its discretion may limit the carrying on of such business to incorporated associations.—Brady v. Mattern, Iowa, 100 N. W. Rep. 358.

35. CARRIERS — Boarding Wrong Car. — Passenger bound for C, who boarded a car bound only for B, an intermediate point, held to have no contract for carriage beyond B.—Braymer v. Seattle, R. & S. Ry. Co., Wash., 77 Pac. Rep. 495.

36. CARRIERS—Care Required as to Passengers. — A carrier held not bound to do everything that can be done to insure the safety of its passengers, but only to the highest degree of care consistent with the practical conduct of its business.—Johnson v. Seattle Electric Co., Wash., 100 N. W. Rep. 677.

37. CARRIERS—Expulsion of Passenger.—Where a railroad company fails to run its trains on time, and the ticket holder boards the first passenger train thereafter, he is not to be ousted on the ground that the limit of the ticket had expired.—Marx v. Louisiana Western R. Co., La., 36 So. Rep. 862.

38. CARRIERS—Negligence, Res Ipsa Loquitur.—The throwing of a passenger from a car, which would not have happened if the required degree of care had been used, held to raise a presumption of negligence —Fitch v. Mason City & C. L. Traction Co., Iowa, 100 N. W. Rep. 618.

39. CARRIERS—Oral Contract of Shipment.—In an action against a carrier for delay in transporting cattle, held proper to admit plaintiff's testimony with reference to the terms of his alleged oral contract of shipment.—Chicago, R. I. & T. Ry. Co. v. Halsell, Tex., 81 S. W. Rep. 1241.

40. CERTIORARI—Right of Appeal.—Where a relator has a right of appeal, *certiorari* is not a proper remedy. —State v. Leche, La., 36 So. Rep. 868.

41. CHAMPERTY AND MAINTENANCE—Allowance of Claim.—Assignment of allowed claim against the estate of a decedent held not illegal, under Pen. Code, § 161, forbidding purchase of evidence of debt by an attorney. —*In re* Cummins' Estate, Cal., 77 Pac. Rep. 479.

42. COMPROMISE AND SETTLEMENT—Failure of Consideration.—Plaintiff held not entitled to set aside settlement of pending action, because consideration inducing him to enter into the settlement failed thereafter.—Pryor v. Newbold, S. Car., 48 S. E. Rep. 275

43. CONSTITUTIONAL LAW—Building and Loan Associations.—Courts will not interfere with the discretion of the legislature in its exercise of the power to provide for the public welfare, so long as it keeps within the fair and reasonable scope of its powers.—Brady v. Mattern, Iowa, 100 N. W Rep. 358.

44. CONSTITUTIONAL LAW—Liability of County for Services of Physician.—A physician having contracted for and rendered services to a local board of health at specified prices at a time when the county was liable therefor, on allowance of claim by the board of health, held entiled to pay for such services rendered prior to the taking effect of Pub. Acts 1903, p. 6, No. 7, at the rate specified, notwithstanding such act.—Kapp v. Board of Auditors of Washtenaw County, Mich., 100 N. W. Rep. 603.

45. CONSTITUTIONAL LAW—Assessments.—The question of benefit *vel non* to particular property included within a local assessment district held a legislative, and not a judicial, question.—S. D. Moody & Co. v. Spotorno, La., 36 So. Rep. 836

46. CONSTITUTIONAL LAW—Peddler's License Tax.—That part of section 8, p. 156, Sess. Laws 1901, relating to the licensing of peddlers and solicitors, and confining the taking of orders for goods sold to merchants only, is class legislation.—*In re* Abel, Idaho, 100 N. W. Rep. 621.

47. CONSTITUTIONAL LAW—Regulation of Insurance Companies.—Equal protection of laws, guarantied by the constitution, requires equality on persons according to their relations, and not on persons as such.—State v. Fraternal Knights and Ladies, Wash., 77 Pac. Rep. 500.

48 CONTEMPT—Review.—The judgment of a district court that a contempt had been committed was not re-

viewable by the supreme court, where the other court had jurisdiction of the parties and subject-matter.—*Ex parte* Brown, Ariz., 77 Pac. Rep. 489.

49. CONTRACTS—Survivorship.—A right to maintain an action upon an obligation in favor of joint payees survives on the same basis as in the case of copartners. —Semper v. Coates, Minn., 100 N. W. Rep. 662.

50. CONTRACTS—Agreement Between Contractors as to Bidding.—An agreement by a contractor, negotiating for the construction of a building, to abandon the negotiations and allow another to obtain the contract, held not contrary to public policy.—Moore v. First Nat. Bank, Ala., 36 So. Rep. 777.

51. CONTRACTS—Performance.—It cannot be inferred that a party waives his rights under a contract by making a payment thereunder while at the same time making demand for his rights.—Griffith v. Newell, S. Car., 48 S. E. Rep. 259.

52. CONVERSION—Legacies.—Under the provisions of a will lands sold by the executors under a power held to be regarded as personalty to the extent of legacies, but realty as to a surplus.—*In re* Weinstein's Estate, 89 N. Y. Supp. 535.

53. CORPORATIONS — Authority of President. — The president of a corporation has no authority to bind it by his admission of a debt due by it.—Robins Min. Co. v. Murdock, Kan., 100 N. W. Rep. 596.

54. CORPORATIONS—By-Law Lien.—Where a stock certificate makes no reference to the existence of a lien, a pledgee or transferee of the stock is not affected by the terms of a by-law lien of which he has no notice —Bank of Culloden v. Bank of Forsyth, Ga., 48 S. E. Rep. 226.

55. CORPORATIONS—Insurance Agents.—The business of agency is lawful and within the powers granted by Acts 1888, p. 27, No. 36, authorizing incorporation —State v. Michel, La., 36 So. Rep. 869.

56. CORPORATIONS—Rescission of Contract.—Where a company recognized plaintiff as a stockholder, and he voted the stock at stockholders' meetings, he was estopped to deny a delivery of the stock to him and acceptance of it —Cotter v. Butte & Ruby Valley Smelting Co., Mont., 77 Pac. Rep. 509.

57. CORPORATIONS —Stock Subscription.—Purchaser of stock in corporation held not estopped by other deals in such stock to obtain rescission of original contract for fraud.—Mulholland v. Washington Match Co., Wash., 77 Pac. Rep. 497.

58. COUNTIES — Police Juries.—Police juries are without power to issue negotiable paper —Glass v. Parish of Concordia, La., 37 So. Rep. 189.

59. COVENANTS — Title to Personalty.—A purchaser of personalty, who is in the undisputed possession thereof, held not entitled to substantial damages for a breach of covenant to furnish a good title.—Barnum v. Cochrane, Cal., 100 Pac. Rep. 656.

60. CREDITORS' BILL—Amendment of Bill.—An amendment of a creditor's bill, not changing the cause of action, held to relate back to the date of the filing of the bill for the purpose of obtaining a lien on the property sought to be recovered.—Bryan v. Zarecor, Tenn., 81 S. W. Rep. 1252.

61. CREDITORS' SUIT—Return of Nulla Bona.—A judgment creditor may, after a return of *nulla bona*, sue in equity for the sale of property conveyed by the debtor by a trust deed made subsequent to the contracting of the debt.—South Carolina Loan & Trust Co. v. Lawton, S. Car., 48 S. E. Rep. 282.

62. CRIMINAL TRIAL — Declarations of a Co-conspirator. — Declarations of an alleged co-conspirator made prior to the formation of the conspiracy, and not in furtherance of any plan between him and defendant, are not admissible against defendant. — State v. Walker, Iowa, 100 N. W. Rep. 354.

63. CRIMINAL TRIAL—Exclusion of Witnesses. — The court has a discretionary power to exclude accused's witness from the courtroom during the examination of other witnesses.—State v. Worthen, Iowa, 100 N. W. Rep. 330.

64. CRIMINAL TRIAL—Peremptory Challenges. — It is not reversible error to refuse a proper challenge, where there remain exhausted challenges at the time of going to trial.—Territory v. Shankland, Ariz., 77 Pac. Rep. 492.

65. CRIMINAL TRIAL—Statement of Facts. — A statement of facts in a criminal case should state that it contains all the facts admitted, and the facts admitted to have been proven, and the evidence of the facts disputed.—Territory v. Flores, Ariz., 77 Pac. Rep. 491.

66. CRIMINAL TRIAL — Statutory Penalty. — Unless a statutory penalty is prescribed for an act which was criminal at common law, such act is not a crime in Michigan.—*In re* Lambrecht, Mich., 100 N. W. Rep. 606.

67. DEEDS—Ambiguity.—The words in the descriptive clause of a deed "being the same land owned and occupied by me," occurring immediately after the description of the land by metes and bounds, did not create an ambiguity in the deed.—Malette v. Wright, Ga., 48 S. E. Rep. 229.

68. DEEDS—Construed as to Restriction.—A deed construed, as to the restriction that the premises shall not be occupied, except for "one dwelling house to each lot."—Harris v. Roraback, Mich., 100 N. W. Rep. 391.

69. DESCENT AND DISTRIBUTION — Rights of Divorced Husband.—A divorced husband is cut off from his rights of inheritance in his wife's estate by a decree of divorce. —Jacobs v. Gaskill, Kan., 77 Pac. Rep. 550.

70. DIVORCE—Dower.—A judgment against a husband is no lien on the one-third interest of the wife in his real estate, which descends to her on divorce from her husband for his adultery, under Gen. St. 1894, § 4808.—Keith v. Mellenthin, Minn., 100 N. W. Rep. 366.

71. DIVORCE—Prematurity of Action.—Where a person against whom a judgment of separation from bed and board has been rendered sues more than two years after the signing thereof for final divorce, the plea of prematurity of action held too late —Raymond v. Carrano, La., 36 So. Rep. 787.

72. EMINENT DOMAIN — Title, When Acquired. — The title to property condemned does not become vested until completion of the proceedings, payment of damages, and entry into possession.—*In re* Condemnation of Lands in Ramsey County, Minn., 100 N. W. Rep. 650.

73. ESTOPPEL—Validity of Trust Deed.—Receipt of income from the proceeds of property sold by an executor and trustee held not to estop the beneficiaries from afterwards claiming the property. — Schreyer v. Schreyer, 89 N. Y. Supp. 508.

74. EVIDENCE—Ditch in Street.—In an action for injuries to one who had fallen into a ditch in a street in the nighttime, it was error to permit a witness to testify as to whether a person ordinarily prudent could fail to see the ditch.—Hauchuca Water Co. v. Swain, Ariz., 77 Pac. Rep. 619.

75. EVIDENCE — Parol Agreement Affecting Land.—An agreement by the grantee in a deed to pay a mortgage on the land may be shown by parol.—Mowry v. Mowry, Mich., 100 N. W. Rep. 388.

76. EVIDENCE—Testmony Given on Former Trial. — If a witness is not present in the courtroom at the time his testimony is offered, a translation of his evidence given on a former trial may, under the statutes, be read in evidence.—Fitch v. Mason City & C. L. Traction Co., Iowa, 100 N. W. Rep. 618.

77. EXECUTION—Presumption of Validity.—An execution from the superior court of F county in favor of A and against B, of L county, is not void on its face.— C. C. Ansley Co. v. O'Byrne, Ga., 48 S. E. Rep. 228.

78. EXECUTION—Title of Purchaser at Attachment.— One buying at sheriff's sale under attachment acquires no greater title than the defendant in the attachment had at the time of the sale —Milner & Kettig Co. v. De Loach Mill Mfg. Co., Ala., 36 So. Rep. 765.

79 EXECUTORS AND ADMINISTRATORS — Attorney's Lien.—An attorney's lien accrues through implied con-

tract, and is not affected by the fact that the client is an executor, nor is it confined to moneys recovered by judgment.—*In re* Crouch's Estate, 89 N. Y. Supp. 465.

80. EXECUTORS AND ADMINISTRATORS—Claim Against Estate.—Though the claim in probate allege an express agreement to pay a mutual expectation of payment may be proved.—Harrison v. Harrison, Iowa, 100 N. W. Rep. 344.

81. EXECUTORS AND ADMINISTRATORS — Claims of Broker in Sale of Estate.—Real estate agent, contracting with heirs and administrators for sale of real estate of estate, held to have no claim against the estate — *Ex parte* Simmons, S. Car., 48 S. E. Rep. 279.

82. EXECUTORS AND ADMINSTRATORS — Disinterested Party's Right to Contest Claims. — A person not interested in a decedent's estate has no right to contest the allowance of any claims against the estate.—*In re* Semper's Estate, Minn., 100 N. W. Rep. 668

83. EXECUTORS AND ADMINISTRATORS —Legacies.—A legacy bequeathed in a codicil to a pecuniary legatee provided for in the will held a substitute for the legacy bequeathed in the will. — Sondheim v. Fechenbach, Mich , 100 N. W. Rep. 586.

84. EXECUTORS AND ADMINISTRATORS—Sales Under Power.—Beneficiary vendees under a trust agreement held estopped to assert they received no title, or that the sale, which was one by an executrix under a power, was irregularly made. — Goodell v. Sanford, Mont., 77 Pac. Rep. 522.

85. EXECUTORS AND ADMINISTRATORS—Services Rendered Decedent. — Under an agreement by testator to convey a lot of a certain value to his executor, the latter held entitled, on death of testator before performance of the agreement, to be allowed a claim against the estate for the value of the lot. — *In re* Towne's Estate, Cal., 77 Pac. Rep. 446.

86. EXECUTORS AND ADMINISTRATORS — Setting Aside Tax Sale —An administrator of a succession can stand in judgment to set aside a tax sale and have the property brought back to the mass of the succession.—Succession of Williams v. Chaplain, La., 36 So. Rep. 859.

87. FINDING LOST GOODS — Treasure Trove. — Gold-bearing quarz rock, found buried in the ground where it had evidently been placed several years before, held not to constitute "treasure trove," belonging to the state or the finder.—Ferguson v. Ray, Oreg., 77 Pac. Rep. 600.

88. FRAUD—Right to Rely on Representations —One may rely on representations made concerning complex machine, as to which there is no opportunity of investigation afforded, without making inquiry for himself — Mulholland v. Washington Match Co., Wash., 77 Pac. Rep. 497.

89. FRAUDS, STATUTE OF—Promise to Pay Debt of Another. — A promise on a sufficient consideration to pay a debt of the promisee to a third person is not within the statute of frauds.—Moore v. First Nat. Bank, Ala., 36 So. Rep. 777.

90. FRAUDULENT CONVEYANCES — Attachment. — An attachment of real estate alleged to have been fraudulently conveyed by a debtor cannot be sustained, under a creditor's bill, where the claim asserted has not been reduced to judgment.—Aigeltinger v. Einstein, Cal., 77 Pac. Rep. 669.

91. GUARDIAN AND WARD—Right to Custody —Religious opinions held entitled to no weight in proceedings to determine the custody of a minor child.—Jones v. Bowman, Wyo., 77 Pac. Rep. 439.

92. HAWKERS AND PEDDLERS—Licenses.—A city ordinance, providing that no person shall exercise the vocation of a peddler within the city without first paying a yearly license of $125, is not so manifestly unreasonable as to render it void.—State v. Jensen, Minn., 100 N. W. Rep. 644.

93. HIGHWAYS—Adverse User.—Where it has been determined that a public highway has been acquired by adverse user, the cause will be remanded for further proceedings to determine the boundaries thereof.—Arndt v. Thomas, Minn., 100 N. W. Rep. 378.

94. HIGHWAYS — Road District Contractor. — Where county commissioners have contracted for the care of the roads, it is against the interest of the county for the contractors to be released from their obligation.—Corker v. Elmore County Com'rs, Idaho, 77 Pac. Rep. 633.

95. HOMICIDE — Evidence. — Where a homicide was committed by shooting through a tin lantern and hitting deceased, held proper to admit in evidence the bullet taken from the body of deceased, together with a piece of tin.—People v. Morales, Cal., 77 Pac. Rep. 470.

96. HUSBAND AND WIFE—Acknowledgment of Deed by Wife —A deed by a husband, acknowledged by the wife as such, and not as owner, does not convey an interest in the land then owned or thereafter acquired by the wife in her own right.—Hendricks v. Musgrove, Mo., 81 S. W. Rep. 1265.

97. HUSBAND AND WIFE — Entireties and Joint Tenancies.—Estates by entireties and joint tenancies, with right of survivorship in favor of the husband surviving his wife, do not exist as applied to real and personal property jointly owned by them. — Semper v. Coates, Minn., 100 N. W. Rep. 662.

98. HUSBAND AND WIFE — Marriage Settlement. — A marriage trust deed and contemporaneous agreement construed together, and held not to affect rights of existing creditors of the husband.—South Carolina Loan & Trust Co. v. Lawton, S. Car., 48 S. E. Rep. 282.

99. HUSBAND AND WIFE—Married Woman's Contract.—Where the husband indorses a contract of accord and satisfaction made by his wife, she is bound thereby, so far as her coverture is concerned.—Brundige v. Nashville, C. & St. L. R. R., Tenn., 81 S. W. Rep. 1248.

100. HUSBAND AND WIFE — Payment of Claims Out of Community Property. — Where the funds of the community are insufficient to pay the claims of both spouses, the charges in favor of the wife must be taken out of it before those in favor of the husband.—Bergey v. Labat, La., 36 So. Rep. 829.

101. HUSBAND AND WIFE—Separate Property.—A deed made by a third person to a wife at the husband's request vests in her the property as her separate property.—Alferitz v. Arrivillaga, Cal., 77 Pac. Rep. 657.

102. HUSBAND AND WIFE — Wife's Earnings.—A husband may, independently of statutes, waive his right to his wife's earnings, so as to entitle her to recover them in her own name.—*In re* Dailey's Estate, 89 N. Y. Supp. 538.

103. INJUNCTION—Contract of Board of Education.—An incorporated academy held entitled to injunction to prevent a village board of education from interfering with their management of the institution. — Trustees of Washington Academy in Salem, Washington County, v. Cruikshank, 89 N. Y. Supp. 375.

104. INTOXICATING LIQUORS—"Separate Buildings."—For the purpose of obtaining necessary consents to the conduct of liquor business in the east half of a double dwelling house, the west half of the house may properly be treated as a separate building.—*In re* Patterson, 89 N. Y. Supp 437.

105. INTOXICATING LIQUORS — Sunday Closing. — That defendant's saloon was opened by his bartender on Sunday without authority and contrary to defendant's instructions held no defense to a prosecution of defendant therefor —People v. Possing, Mich., 100 N. W. Rep. 396.

106. JUDGES—Modification of Order Made by Predecessor.—A circuit judge may alter or modify an order made by his predecessor referring a case to take and report the testimony, such order being administrative.—Pratt v. Timmerman, S. Car., 48 S. E. Rep. 255.

107. JUDGMENT—Effect on Strangers. — One who acquired title to property before the beginning of a chan

cery suit, to which he was not made a party, was not bound by the decree rendered therein.—Nunnelly v. Barnes, Ala., 36 So. Rep. 763.

108. JUDGMENT—Invalidity Apparent from Judgment Roll.—A judgment is not void on its face, unless its invalidity is apparent from an inspection of the judgment roll.—People v. Davis, Cal., 77 Pac. Rep. 651.

109. JUDGMENT—Res Judicata. — Certain warrants, negotiable in form, were placed in the hands of the trustee, and part of them were owned by him, and he sued thereon in his own name. Held, that the judgment was *res judicata* against the trustee and against the other owner of the warrants.—Glass v. Parish of Concordia, La., 37 So. Rep. 189.

110. JUSTICES OF THE PEACE—Paying Over Money Paid Into Court.—Justice of the peace held to have acted judicially in paying over money paid into court, and not liable for loss occasioned, however much he may have erred.—Sorensen v. Wellman, Kan., 77 Pac. Rep. 536.

111. LANDLORD AND TENANT—Destruction of Building. —Re-entry by a landlord to reconstruct the rented building, which had been destroyed by fire, held with the implied assent of the tenant and not to relieve the latter from liability for rent.—Schloss v. Schloss, Mich., 100 N. W. Rep. 392.

112. LANDLORD AND TENANT—Seizure for Rent. — Where a lessee removes from the leased premises property pledged for rent, if the lessor believes he is not sufficiently secured, he may seize for his rent, whether due or to become due.—Milot v. Conrad, La., 36 So. Rep. 837.

113. LIFE INSURANCE—By-laws.—The amendment of a by-law of a mutual life association held not to change its manner of doing business, but had reference merely to different plans of raising funds to meet losses.—Sherman v. Harbin, Iowa, 100 N. W. Rep. 622.

114. LIFE INSURANCE—Premium Note.—Fraud in obtaining a note for payment of premium on insurance policy held waived by failure to return policy and give notice of repudiation.—National Life & Trust Co. v. Omans, Mich., 100 N, W. Rep. 595.

115. LIFE INSURANCE—Renewal of Fidelity Bond.—A fidelity bond issued for a succeeding term of the president of a mutual life association held an independent undertaking, and not a renewal of a bond previously executed.—Sherman v. Harbin, Iowa, 100 N. W. Rep. 629.

116. LIVERY STABLE KEEPERS—License Tax.—Where a municipal ordinance imposes a license tax on every livery or feed stable, a complaint charging accused with conducting a livery or feed stable without license does not entirely fail to state a public offense.—*Ex parte* Jackson, Cal., 77 Pac. Rep. 457.

117. MANDAMUS—Clerk of Court.—Mandamus will lie to compel a clerk of court to perform his statutory duty of searching the records and certifying transcripts of judgment entered on his docket.—State v. Scow, Minn., 100 N. W. Rep. 382.

118. MASTER AND SERVANT—Assumed Risk.—In an action by a servant for injuries, owing to his hand being caught in unguarded cogs, the question of contributory negligence was for the jury.—Buehner v. Creamery Mfg. Co., Iowa, 100 N. W. Rep. 345.

119. MASTER AND SERVANT—Dangerous Appliances.—Pipes about a mill, subject at times to heavy pressure from escaping steam, should be screwed on the boilers with special care.—Bonnin v. Town of Crowley, La., 36 So. Rep. 842.

120. MASTER AND SERVANT—Injury to Railroad Employee, Defective Track.—Failure of brakeman to set switch whereby engineer is injured, held neglect of master.—Richey v. Southern Ry. Co., S. Car., 48 S. E. Rep. 285.

121. MASTER AND SERVANT—Scope of Employment.—An employee who obeys the order of the manager of his employer, cannot be considered engaged in work beyond the scope of his employment.—Bonnin v. Town of Crowley, La., 36 So. Rep. 842.

122. MONOPOLIES—Class Legislation.—The absolute prohibition of unincorporated associations and individuals from engaging in the building and loan business does not create a monopoly, so long as the business is open to all corporations complying with reasonable statutory conditions.—Brady v. Mattern, Iowa, 100 N. W. Rep. 358.

123. MORTGAGES—Record as Affecting Notice.—The record of a deed absolute, or of a mortgage, which does not state particulars of the debt, is sufficient to put creditors and subsequent purchasers on notice that the grantee has rights in the property conveyed.—Equitable Building & Loan Assn. v. King, Fla., 37 So. Rep. 181.

124. MORTGAGES—Release or Cancellation.—A mortgage may be canceled or released by the mortgagee at any time without consideration, and with or without the consent of the mortgagor.—Mueller v. Renkes, Mont., 77 Pac. Rep. 512.

125. MORTGAGES — Right to Redeem. — Mortgagors, made party defendant to a suit to redeem, held to be the only ones in a position to make objection, rendering a demurrer to the bill by the mortgagees on that ground untenable.—Rothschild v. Bay City Lumber Co., Ala., 36 So. Rep. 785.

126. MUNICIPAL CORPORATIONS—Authority of Officers. —One dealing with the officers of a municipality is bound at his peril to take notice of the limitations upon their power and authority.—Bennett v. Incorporated Town of Mt. Vernon, Iowa, 100 N. W. Rep. 349.

127. MUNICIPAL CORPORATIONS — Construction of Sewer.—The damage to which a city was entitled for failure of a contractor to build a sewerage system according to the contract can be recovered in an action by the city against the surety.—City of Winona v. Jackson, Minn., 100 N. W. Rep. 368.

128. MUNICIPAL CORPORATIONS—Contractor's Failure to Build Sewer.—Where contractors agreed with the city to build a sewer system, and refused to continue the work, they were liable to the city in damages for failure to complete the contract.—City of Winona v. Jackson, Minn., 100 N. W. Rep. 368.

129. MUNICIPAL CORPORATIONS—Dangerous Premises, —Where the owner of property abutting on a city street dug a ditch across the sidewalk and left it unguarded, and a woman fell into it, the question of her contributory negligence held for the jury.—Wiens v. Ebel, Kan., 100 N. W. Rep. 553.

130. MURDER—Dying Declarations.—In order to render dying declaration admissible, it must be first shown that the declarant was not only *in articulo mortis*, but under the sense of impending death without hope of recovery.—State v. Knoll, Kan., 77 Pac. Rep. 560.

131. MUNICIPAL CORPORATIONS—Negligent Act of City Employee.—A city is liable for the negligent act of a servant of the board of park commissioners in stretching a rope across a boulevard, whereby a bicycle rider, in attempting to avoid it, collided with a team and was injured.—Kleopfert v. City of Minneapolis, Minn., 100 N. W. Rep. 669.

132. MUNICIPAL CORPORATIONS—Proof of Adoption of Ordinance.—The certificate of the clerk of the city council that an ordinance has been adopted is *prima facie* proof thereof.—S. D. Moody & Co. v. Spotorno, La., 36 So. Rep. 836.

133. NEGLIGENCE—Failure to Look for Danger.—Negligence is not imputable to a person for failing to look for danger, when under the surrounding circumstances he had no reason to apprehend any.—Missouri Pac. Ry. Co. v. Johnson, Kan., 77 Pac. Rep. 576.

134. NEGLIGENCE—Proximate Cause.—A defect in a cylinder held not to be considered the proximate cause of an injury from the blowing out of a plunger by the application of steam.—Chicago, R. I. & M. Ry. Co. v. Harton, Tex., 81 S. W. Rep. 1236.

135. NEW TRIAL—Additional Evidence.—A new trial will not be granted to enable a party to obtain additional evidence, which is not newly discovered and which is merely cumulative.—Ryder v. Leach, Ariz., 77 Pac. Rep. 490.

136. NEW TRIAL—Objection to Verdict Rendered in Five Minutes.—That it took the jury in an action on a note less than five minutes to return a verdict for plaintiff was no reason for setting it aside.—Farnsworth v. Fraser, Mich., 100 N. W. Rep. 400.

137. NOTARIES—False Certificate.—There can be no recovery against a notary for falsely certifying to an acknowledgment, unless the person seeking such recovery relied on the statements in the certificate.—Mahoney v. Dixon, Mont., 77 Pac. Rep. 519.

138. NOVATION—Settlement of Conditional Claim.—Contract to pay certain amount in settlement of a conditional claim for a larger sum held a valid novation, preventing a subsequent recovery on the original contract on the occurrence of the contingency contemplated thereby.—Bandman v. Finn, 89 N. Y. Supp. 504.

139. PLEDGES—Enforcement of Lien.—A pledge of money on negotiable paper in the hand of a third party to secure a sale held to vest in the vendor a lien on the fund, which, on performance of the contract by him, he may enforce in equity.—Western Fly Guard Co. v. Hodges, Neb., 100 N. W. Rep. 407.

140. PLEDGES—Foreclosure.—The lien resulting from a pledge is subject to strict foreclosure.—Blood v. Shepard, Kan., 77 Pac. Rep. 565.

141. PRINCIPAL AND SURETY—Fidelity Bond.—The obligee in a fidelity bond is not bound to aid the surety in determining the propriety of entering into the contract, nor to warn him of the risk, when all the facts are as accessible to the surety as to the obligee.—Sherman v. Harbin, Iowa, 100 N. W. Rep. 629.

142. PROPERTY—Quieting Title—A deficient muniment of title to real estate cannot be supplemented by the recordation of the affidavit of the claimant.—Patterson v. Landru, La., 36 So. Rep. 857.

143. RAILROADS—Defective Appliances.—The propriety of a brakeman using his foot to control a refractory drawbar, while attempting to make a coupling, held a question for the jury.—Brinkmeier v. Missouri Pac. Ry. Co., Kan., 77 Pac. Rep. 586.

144. RAILROADS—Occupation of Narrow Street.—A railroad company held to have no right to lay its tracks in a street so narrow that there would not be room for vehicles to pass.—Mobile, J. & K. C. R. Co. v. Middleton, Ala., 36 So. Rep. 782.

145. RECEIVERS—Appointment.—An order of court appointing a receiver to take custody of property involved in litigation, which was unwarranted and erroneous, but not absolutely void, is not open to collateral attack.—Bowman v. Hazen, Kan., 77 Pac. Rep. 589.

146. SALES—Refusal to Accept.—A vendor, to recover a claim in damages from the vendee for refusal to accept the goods, must show compliance with the terms of the contract.—Shreveport Cotton Oil Co. v. Friedlander La., 36 So. Rep. 853.

147. SET-OFF AND COUNTERCLAIM—Date of Credits.—A set-off made up of different items should be credited as of the dates of the respective items.—Goodell v. Sanford, Mont., 77 Pac. Rep. 522.

148. TAXATION—Collateral Inheritance Tax.—Collateral inheritance tax law held not violative of the fourteenth amendment to the federal constitution.—*In re* Campbell's Estate, Cal., 77 Pac. Rep. 674.

149. TAXATION—Franchise Tax.—The franchise tax imposed by Laws 1901, p. 316, ch. 132, is not a tax on property, but on corporate functions.—Security Trust Co. v. Liberty Bldg. Co., 89 N. Y. Supp. 340.

150. TAXATION—Notice of Tax Sale.—Where no notice of a tax sale was given to the tax debtor, the title is fatally defective.—Succession of Williams v. Chaplain, La., 36 So. Rep. 859.

151. TRIAL—Instructions.—In an action against a municipal corporation for maintaining a dam, so as to cause plaintiff's land to be overflowed, modification of an instruction on dedication held not error.—Boye v. City of Albert Lea, Minn., 100 N. W. Rep. 642.

152. TROVER AND CONVERSION—Caveat Emptor.—It is, in general, no defense to an action of trover that defendant is a purchaser for value without notice of the rights of the real owner.—Milner & Kettig Co. v. De Loach Mill Mfg. Co., Ala., 36 So. Rep. 765.

153. TRUSTS—Reconveyance by Trustee.—Reconveyance of trustee in a trust deed held to vest in the grantor an absolute title free from any trust.—Schreyer v. Schreyer, 89 N. Y. Supp. 508.

154. VENDOR AND PURCHASER—Conditional Acceptance.—A vendor may, if he is doubtful of a proposed vendee's ability to perform, agree to sell providing the purchaser proves able to perform its conditions.—Flynn v. Jordal, Iowa, 100 N. W. Rep. 326.

155. VENDOR AND PURCHASER—Contract for Sale of Land—Vendee under contract for sale of land held entitled to invoke equitable cognizance by foreclosure.—Flanagan Estate v. Great Cent. Land Co., Oreg., 77 Pac. Rep. 485.

156. VENDOR AND PURCHASER—Withdrawal of Offer.—Vendees of land have a right to withdraw their offer of purchase at any time before its acceptance by the vendor.—Flynn v. Jordal, Iowa, 100 N. W. Rep. 326.

157. VENDOR AND PURCHASER—Time the Essence of Contract in Sale of Real Estate.—Time is not of the essence of a contract for the sale of real estate, in equity, unless made so by express agreement, by the nature of the contract itself, or by the circumstances under which it was executed.—Wright-Blodgett Co. v. Astoria Co., Oreg., 77 Pac. Rep. 599.

158. WAREHOUSEMAN—Liability for Loss of Goods.—A warehouseman held liable for loss of goods stored in a place other than that agreed on.—Hudson v. Columbian Transfer Co., Mich., 100 N. W. Rep. 402.

159. WATERS AND WATER COURSES—Artificial Change of Spring—The use by an upper riparian owner of water from a spring which was never tributary to the stream in which a lower owner claimed rights is not adverse to the lower owner.—Harrington v. Demaris, Oreg., 77 Pac. Rep. 603.

160. WILLS—Contest After Probate.—Where, in a will contest, after probate, the contestants fail to introduce any evidence on the issue of nonexecution, the court was not required, on the cause being remanded, to continue the proceedings for evidence on such issue.—*In re* McKenna's Estate, Cal., 77 Pac. Rep. 461.

161. WILLS—Signature.—It cannot be presumed that testator signed the will from the fact that the body of the will is in his handwriting.—*In re* Burtis' Will, 89 N. Y. Supp. 441.

162. WILLS—Time from Which Will Speaks.—The rule that a will speaks from the death of the testator applies only so far as the facts and circumstances are susceptible of anticipation by the testator, so that he can place himself in the position he will be at the time of his death in respect to his property and family.—*In re* Hopkins, 89 N. Y. Supp. 467.

163. WITNESSES—Competency of Physician as to Reasonableness of Charges.—A physician held competent to testify to the reasonableness of charges for services rendered decedent; his book of account containing the same having been admitted in evidence without objection.—Kwiecinski v. Newman's Estate, Mich., 100 N. W. Rep. 391.

164. WITNESSES—Depositions.—In an action on a note, evidence showing that defendant's deposition as originally made was different from the deposition as corrected and from her testimony on trial held competent for the purpose of impeachment.—Gasquet v. Pechin, Cal., 77 Pac. Rep. 481.